

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





FOR MR. CHIEF JUSTICE MARTIN.

## TRANSCRIPT OF RECORD

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Court of Appeals of the District of Columbia

APRIL TERM, 1928.

No. 4793.

565

BARTLESVILLE ZINC COMPANY, A CORPORATION,  
APPELLANT,

*vs.*

INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.

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APPELLEE.

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## INDEX

|                                                            | Original | Print |
|------------------------------------------------------------|----------|-------|
| Caption .....                                              | <i>a</i> | 1     |
| Petition for writ of mandamus.....                         | 1        | 2     |
| Exhibit "A".....                                           | 12       | 11    |
| Exhibit "B".....                                           | 22       | 17    |
| Rule to show cause.....                                    | 23       | 17    |
| Marshal's return.....                                      | 24       | 18    |
| Answer of Interstate Commerce Commission.....              | 24       | 18    |
| Exhibit A.....                                             | 32       | 24    |
| Reply of petitioner to answer of defendant.....            | 39       | 31    |
| Petitioner's Exhibit "C".....                              | 44       | 35    |
| Order discharging rule and dismissing petition; judgment.. | 48       | 39    |
| Appeal noted.....                                          | 48       | 40    |
| Memorandum: Bond on appeal approved and filed.....         | 48       | 40    |
| Assignment of error.....                                   | 49       | 40    |
| Designation for preparation of record.....                 | 49       | 40    |
| Clerk's certificate.....                                   | 51       | 41    |





# Court of Appeals of the District of Columbia

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No. 4793.

BARTLESVILLE ZINC COMPANY, a Corporation, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION.

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*a* Supreme Court of the District of Columbia.

At Law.

No. 74273.

BARTLESVILLE ZINC COMPANY, a Corporation, Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause to wit:



Filed November 5, 1927.

In the Supreme Court of the District of Columbia.

At Law.

No. 74273.

BARTLESVILLE ZINC COMPANY, a Corporation, Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

To the Honorable Judges of the Supreme Court of the District of Columbia:

Your petitioner, Bartlesville Zinc Company, respectfully shows:

1. That it is a corporation, organized under the laws of the State of New York and licensed to do business in the State of Oklahoma, and as such is engaged in the manufacture of zinc at Blackwell, Kay County, State of Oklahoma;

2. That the defendant, Interstate Commerce Commission, is an administrative tribunal, created by acts of Congress, authorized and empowered to administer the Interstate Commerce Act and the Federal Control Act and charged with the duty of executing and enforcing the provisions of those statutes;

3. That on May 7, 1920, the petitioner filed with the defendant, Interstate Commerce Commission, a formal complaint against the Director General of Railroads, As  
2 Agent, for the purpose of the recovery of certain demurrage charges paid by it and which were illegally assessed against it by the Director General of Railroads during the period of Federal Control, to which, from January to August, 1918, both inclusive, on numerous carloads of ore, coal and other commodities consigned to the petitioner at his plant located at Blackwell, Kay County, State of Oklahoma; and which demurrage charges were illegally assessed because of the absence of written notice in violation of the carrier's applicable demurrage tariff, which provided in part as follows:

“Rule 5—Placing Cars for Unloading.

“Section A. When delivery of cars consigned or ordered to any other than public delivery tracks or to industrial interchange tracks cannot be made on account of the act or neglect of the consignee, or the inability of the consignee to receive, delivery will be considered to have been made when the cars were tendered. The carrier’s agent must send or give the consignee *written notice* of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee. This will be considered constructive placement.”

That thereafter, to-wit, on October 23, 1922, the defendant, Interstate Commerce Commission, filed its report and rendered its decision in the said cause and ordered the complaint dismissed upon the ground that the said demurrage charges attacked having been assessed *substantially* in compliance with the provisions of the applicable tariff, they were legally applicable and were not unlawful. (Bartlesville Zinc Company vs. Director General, As Agent, No. 11468, 74 I. C. C. Rep. 26.)

4. That the Commission’s findings of ultimate facts, as set forth in its report in 74 I. C. C. Rep. 26, et seq., are taken by the petitioner as true and are *res adjudicata* and as such are binding upon the petitioner and the defendants.

That the decision of the Commission in dismissing the petitioner’s complaint was based upon an interpretation of law by the Commission which was contrary to a later construction of the same proposition of law by the United States Supreme Court and subsequently so recognized and applied by the Commission.

That the petitioner hereby seeks to compel the defendant, Interstate Commerce Commission, to enter such order in compliance with its duty as will afford the petitioner the relief to which it is entitled under the law.

5. That the gravamen of this action is the failure and refusal of the defendant, Interstate Commerce Commission, to enter a final valid order, pursuant to its findings of ultimate facts and in accordance with the law applicable thereto, as will authorize a refund to the petitioner of the amount of overcharges paid by it.



6. That *written notices* of the carrier's inability to deliver the cars in question because of conditions attributable to the consignee (petitioner) were not sent or given to it, as provided by the applicable tariff.

That the Commission found as follows:

“No evidence was offered that the demurrage charges assessed were unreasonable in and of themselves, and *the sole question is whether they were applicable under the provisions of the governing tariff.* It is clear that under the conditions surrounding the switching of cars from tracks 1 and 2 to unloading points within the plant there was *an arrangement mutually recognized*, whereby individual cars were placed at particular unloading points under the direction and control of complainant's yard foreman or his assistant; and that the detention of the cars on tracks 1 and 2 was attributable to complainant. As before stated, due notice of *arrival* was promptly given; and, in addition, *complainant had actual acknowledge* at all times by daily check and written record of the placement and detention on tracks 1 and 2 of shipments consigned to it.” (74 I. C. C. Rep. 26, 29.)

That the Commission further held as follows:

“The demurrage charges were assessed in *substantial compliance* with the provisions of the applicable tariffs.” (74 I. C. C. Rep. 26, 30.)

That the Commission accepted the conduct of the parties as constituting a *substantial compliance* with the published tariff in lieu of the *written notice* specifically required from the carrier by such tariff.

7. That all of the cars in question were consigned to the petitioner to its private tracks within its plant enclosure and not to public-delivery tracks or to industrial interchange tracks; and, that there was no *constructive placement*, so as to permit the accrual of demurrage charges within the meaning of Rule 5, Section A of the applicable tariff, hereinbefore set forth, in the absence of the required *written notice*.

That the following findings of ultimate facts made by the Commission in its report are to the effect that all of the



cars in question were consigned to the petitioner's *private tracks within its plant enclosure*, and not to public-delivery tracks or to industrial interchange tracks:

“Complainant owns and maintains within its plant enclosure at Blackwell a system of tracks connecting with the rails of the Atchison, Topeka and Santa Fe, hereinafter called the Santa Fe, at a point on the latter's right of way which adjoins the southwestern corner of the enclosure. In addition to its main-line track the Santa Fe owns and maintains adjacent to the enclosure two sidings, hereinafter called tracks 1 and 2, approximately 3,000 and 2,000  
5 feet in length, respectively. There are not other industries in the vicinity of the plant, and the evidence shows that tracks 1 and 2 were constructed to afford additional *storage space* for loaded and empty cars and to facilitate their handling to and from the plant. (p. 26) Cars were at no time unloaded while upon those tracks and it appears that they were never intended to be used for that purpose. The Santa Fe is the only carrier serving the complainant's plant. The St. Louis-San Francisco also reaches Blackwell, but shipments for complainant over that road are switched by the Santa Fe from the Blackwell yards to the plant, a distance of about 1 mile. Delivery at the plant is made without any charge in addition to the line-haul rates. \* \* \* Upon arrival of each shipment at the Blackwell yards written notice identifying the car by initials and number, point of origin and contents, was promptly given complainant. Without further notice the cars were moved to the plant, by either line-haul or switching engine of the Santa Fe, and generally were placed on tracks 1 or 2. After being there held for varying periods, they were removed under circumstances hereinafter described, to unloading points within the plant. \* \* \* (p. 27) Since 1916 the Santa Fe has maintained a switching engine and crew at complainant's plant with instructions to perform whatever switching service complainant requested. The crews assigned to the plant during the greater part of the time were familiar with its requirements and switched cars between tracks 1 and 2 and the plant without detailed instructions except when requested to spot particular cars. If the crews did not know where particular cars should be placed,

they obtained instructions from complainant's yard foreman or his assistant. (p. 29) \* \* \* There were certain established points of unloading within the plant for the various commodities received. \* \* \* The actual capacity of the plant tracks exceed somewhat that of tracks 1 and 2. As a general rule, no cars were placed on these tracks except at the established points of unloading; and such spotting was in accordance with complainant's instructions (p. 29).

8. That in the subsequent decision of the Commission in the case of Campbell Construction Company vs. LaCrosse & Southeastern Ry. Co., 95 I. C. C. Rep. 603, 605, decided by the full Commission on January 6, 1925, the Commission in holding that demurrage charges assessed on certain carload shipments were inapplicable because of *lack of written notice* as provided by tariff and awarding  
6 reparation, said:

"We have heretofore found that demurrage charges assessed *under similar circumstances* were applicable and were not unlawful. Bartlesville Zinc Co. v. Director General, 74 I. C. C. 26; International Paper Co. v. Director General, 74 I. C. C. 34.

"But we view the doctrine of Davis v. Henderson, 266 U. S. 92, decided October 27, 1924, as controlling."

That in support of its conclusion, the Commission quoted the following excerpt from the opinion of the United States Supreme Court in Davis v. Henderson, *supra*, (45 Sup. Ct. Rep. 24, 69 L. Ed. 182):

"There is no claim that the rule requiring written notice is void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariff. The rule was a part of the tariff." (Citing, among other cases, Davis v. Cornwell, 264 U. S. 560, 68 L. Ed. 848, 44 Sup. Ct. Rep. 410.)

9. That in the case of Milne Lumber Company vs. Michigan Central Rd. Co. et al., 118 I. C. C. Rep. 180, decided by the Commission on November 27, 1926, it was held that it was immaterial whether the complainant received notice *otherwise* that the shipment was unclaimed, for the tariff requirement that the consignor be advised by *wire* could not



be waived, *such notice being a prerequisite to the accrual of the demurrage*, and cited *Davis vs. Henderson, supra*, and *Campbell Construction Company vs. L. C. & S. Ry. Co. supra*.

That in the case of *Western Bridge & Construction Company vs. St. Louis-S. F. Ry. Co. et al.*, 118 I. C. C. Rep. 607, 609, decided by the Commission on November 29, 1926, the Commission held as follows:

“Actual notice, however, is not a ‘substantial compliance’ \* \* \* with a rule requiring written notice.”  
7 (Citing *Campbell Construction Company vs. L. C. & S. Ry. Co. supra*, and *Davis vs. Henderson, supra*.)

10. That on October 23, 1922, Division Three of the Commission, composed of Commissioners Hall, Eastman and Campbell, filed its reports and rendered its decisions, in the cases of *Bartlesville Zinc Co. vs. Director General, As Agent*, (74 I. C. C. Rep. 26), the case at bar, and *Baltimore Trust Co. vs. Director General, As Agent*, (74 I. C. C. Rep. 22). The facts and issues involved in both cases were substantially identical and involved the construction of the same tariff provision, viz., Rule 5, Section A of the carrier's demurrage tariff hereinbefore set forth. In the *Bartlesville Zinc Company Case*, recovery of the demurrage overcharge was denied. In the *Baltimore Trust Company Case*, recovery of such demurrage overcharge was allowed. The action of the Commission with respect to the rights of the *Bartlesville Zinc Company* was an unjust discrimination against the petitioner, in violation of the provisions of the Interstate Commerce Act.

That the rule of law governing these cases, as subsequently enunciated by the United States Supreme Court and applied by the entire Commission, was stated by Mr. Commissioner Hall in the case at bar in his dissenting opinion therein (*Bartlesville Zinc Co. Case, supra*) and in his qualified concurrence in the *Baltimore Trust Co. Case, supra*.

That in the case at bar, (*Bartlesville Zinc Co. supra*), Mr. Commissioner Hall dissenting, stated in part as follows:



“*Written* notice of inability to deliver because of conditions attributable to the consignee were not sent or given to the consignee, as provided by the applicable tariff.

8 It follows that there was no constructive delivery or placement, for the reasons set forth in my concurring expression in *Baltimore Trust Co., vs. Director General*, 74 I. C. C. 22. Demurrage was illegally assessed and reparation should be awarded.”

That in the case of *Baltimore Trust Company, supra*, Mr. Commissioner Hall, in his qualified concurrence, stated as follows:

“Transportation includes delivery and is not completed without it. A carload shipment is not actually delivered unless the car is placed where it can be unloaded or on tracks from which the consignee customarily takes cars with its own power to points of unloading. Actual delivery is a prerequisite to the accrual of demurrage unless, for a lawful reason named in the delivering carrier’s tariff, actual delivery cannot be made. Constructive delivery or placement may then take its place, but not unless all the acts specified in the tariff as the elements of constructive placement have been performed. The burden is upon the carrier to affirmatively show that these acts have been performed. Where notice *in writing* to the consignee is one of the acts specified and, as here, no alternative is provided, notice *in writing* must be given or the free time does not begin to run. Notice given or acquired in some other manner is not sufficient. For one thing it is not as readily susceptible of proof. Any doctrine of equivalence tends to laxity of practice with all its train of opportunities for preferential treatment. The carriers made their tariff rules with respect to constructive placement for their own benefit and convenience and should be held to strict compliance as a prerequisite to collecting demurrage on cars not in fact delivered.

*Written notices* of constructive placement of these cars were not sent or given complainants, as required by the applicable tariff. Accordingly, the demurrage charges were illegally assessed and complainants are entitled to reparation.”

11. That subsequent to the rendition of the decision by the Commission in the case at bar, the petitioner filed with the defendant, Interstate Commerce Commission, various applications for the entry of an order by the Commission awarding to the petitioner the reparation prayed for in its complaint and to which it was entitled, all of which applications were denied.

9 That finally, on or about May 7, 1927, the petitioner filed with the defendant, Interstate Commerce Commission, a formal demand for the entry of a valid order awarding to the petitioner the reparation to which it is entitled under the law, a copy of which demand is attached hereto and made a part hereof and marked "Exhibit A".

That thereafter, on June 13, 1927, the defendant, Interstate Commerce Commission, refused the petitioner's demand and entered an order accordingly, a copy of which is hereto attached and made a part hereof and marked "Exhibit B".

12. That although the question of law involved in the Commissioner's original decision in the case at bar may have been reviewable in a writ of error proceeding, yet, the Commission's subsequent admission of record of its error of law as stated by it in the Campbell Construction Company Case, *supra*, and its application of the correct rule of law in other cases, (Milne Lumber Company case, *supra*; and Western Bridge & Construction Company Case, *supra*) rendered the question a *moot* one; and that, therefore, a writ of error proceeding at this time would be inadequate and necessitates petitioner seeking relief by way of mandamus.

That inasmuch as the wrongful action of the defendant, Interstate Commerce Commission, in refusing the demand of the petitioner that it be granted the relief to which it is entitled under the law cannot be reviewed in a writ of error proceeding, and that, inasmuch as there is no other expedient and adequate remedy available to the petitioner in the enforcement of its rights, the petitioner hereby seeks relief through the office of this Honorable Court by way of mandamus.

10

13. That the amount of the petitioner's damage which it has sustained by reason of the unlawful assessment



against it and payment by it of the overcharges, aforesaid, is the sum of to-wit, fifty thousand (\$50,000.00) dollars, with interest, and for which amount it is entitled to an award of reparation by the defendant, Interstate Commerce Commission.

14. Wherefore, the petitioner prays a writ of mandamus directed to the defendant, Interstate Commerce Commission, commanding it forthwith to perform its ministerial duty in accordance with the provisions of the Interstate Commerce Act and to enter or cause to be entered in the said cause an order awarding reparation to the petitioner as prayed for in its complaint filed therein, and to take such other action as by law required, in order to ascertain the amount of damages the petitioner is entitled to by way of reparation for the overcharge assessed against and paid by it, and to make such other or further order or orders in the premises as justice may require.

And your petitioner will ever pray, etc.

BARTLESVILLE ZINC COMPANY,  
By HARRY C. BARNES,  
*Its Attorney-in-Fact.*

L. HAROLD SOTHORON,  
*Attorney for Petitioner.*  
ALAN C. McILVAINE, Esq.,  
*Of Counsel.*

11 STATE OF ILLINOIS,  
*County of Cook, ss:*

Harry C. Barnes, being first duly sworn on oath, deposes and says, that he is the agent and attorney of the Bartlesville Zinc Company, the petitioner in the above-entitled cause; that he has read the foregoing petition by him subscribed and that the several matters and things in the said petition contained are true, to the best of his knowledge, information and belief.

HARRY C. BARNES.

Subscribed and sworn to before me, a Notary Public within and for the County of Cook and State of Illinois, this twenty-fourth day of October, A. D. 1927.

[NOTARIAL SEAL.] ALAN C. McILVAINE,  
*Notary Public.*

My Commission expires on July 7th, 1930.

12

(EXHIBIT "A".)

Before the Interstate Commerce Commission.

No. 11,468.

BARTLESVILLE ZINC COMPANY

VS.

DIRECTOR GENERAL, As Agent.

*Petition for Rehearing and Reargument.*

Harry C. Barnes, Attorney for Petitioner. 111 West  
Jackson Boulevard, Chicago, Illinois.

Alan C. McIlvaine, of Counsel.

Dated at Chicago, Illinois, May 7, 1927.

13

Before the Interstate Commerce Commission.

No. 11,468.

BARTLESVILLE ZINC COMPANY

VS.

DIRECTOR GENERAL, As Agent.

*Petition for Rehearing and Reargument.*

Comes now the complainant in the above-entitled proceeding and respectfully petitions the Commission to grant a rehearing and re-argument therein, and in support of such petition respectfully shows:

I. This application is confined to a review of the *question of law* involved in the Commission's decision herein and does not seek to reopen the case on the *facts*. The Commission's findings of ultimate facts, as set forth in its report in 74 I. C. C. Rep., pp. 26, *et seq.*, are taken as true. The decision of the Commission in dismissing the complaint was based upon an interpretation of law which was contrary to a later construction of the same proposition by the United States Supreme Court and subsequently so rec-



ognized and applied by the Commission. This application, therefore, seeks a reversal and modification of the  
14 order of the Commission by reason of holdings of law which have arisen since the hearing, the matters relied upon by the petitioner being fully set forth herein.

II. The complaint was ordered dismissed upon the ground that the demurrage charges attacked were legally applicable.

The published tariff of the defendant, under which these demurrage charges were assessed, contained the following provision:

Rule 5.—Placing Cars for Unloading.

Section A. When delivery of cars consigned or ordered to any other than public-delivery tracks or to industrial interchange tracks cannot be made on account of the act or neglect of the consignee, or the inability of the consignee to receive, delivery will be considered to have been made when the cars were tendered. The carrier's agent must send or give the consignee *written notice* of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee. This will be considered constructive placement."

*Written notice* of the carrier's inability to deliver cars because of conditions attributable to consignee was *not sent or given* to the consignee, as provided by the applicable tariff. However, the Commission found:

15 "No evidence was offered that the demurrage charges assessed were unreasonable in and of themselves, and *the sole question is whether they were applicable under the provisions of the governing tariff*. It is clear that under the conditions surrounding the switching of cars from tracks 1 and 2 to unloading points within the plant there was *an arrangement, mutually recognized*, whereby individual cars were placed at particular unloading points under the direction and control of the complainant's yard foreman or his assistant; and that the detention of the cars on tracks 1 and 2 was attributable to complainant. As before stated, due notice of *arrival* was promptly given; and, in addition, *complainant had actual*

*knowledge* at all times by daily check and written record of the placement and detention on tracks 1 and 2 of shipments consigned to it."

The Commission held as follows:

"The demurrage charges were assessed in substantial compliance with the provisions of the applicable tariffs."

It is evident that the Commission accepted the conduct of the parties as constituting a *substantial compliance* with the published tariff in lieu of the *written notice* specifically required by such tariff. This tariff provision could not be waived by custom, mutual arrangement or agreement, nor could the conduct of the parties operate as an estoppel.

The correct rule of law governing this case, as subsequently enunciated by the United States Supreme Court and this Commission, is well set forth in the dissenting opinion of Mr. Commissioner Hall in this case (74 I. C. C.

Rep. 26, 30), and also the concurring expression of  
16 that gentleman in the case of *Baltimore Trust Company, etc., v. Director General, as Agent* (74 I. C. C. Rep. 22, 24), and in addition thereto his dissenting opinion in the case of *International Paper Company v. Director General, as Agent* (74 I. C. C. Rep. 34, 38).

III. In *Baltimore Trust Company, etc., v. Director General, as Agent* (74 I. C. C. Rep. 22), which involved issues and facts substantially identical with the instant case, except that the Commission found that there was no arrangement, mutually recognized, whereby the tender of cars at the plant and the exhibition to the plant's yardmaster of cards describing the shipments were regarded as substantial compliance with the tariff provisions respecting written notice of constructive placement, the Commission held that the demurrage charges assailed were illegal and awarded reparation.

Mr. Commissioner Hall, in a concurring opinion, concurred in the finding of the majority but not with all that was said in support of it. He said:

"Transportation includes delivery and is not completed without it. A carload shipment is not actually delivered unless the car is placed where it can be unloaded or on tracks from which the consignee customarily takes cars with its



own power to points of unloading. Actual delivery is a prerequisite to the accrual of demurrage unless, for a lawful reason named in the delivering carrier's tariff, actual delivery cannot be made. Constructive delivery or  
17 placement may then take its place, but not unless all the acts specified in the tariff as the elements of constructive placement have been performed. The burden is upon the carrier to affirmatively show that these acts have been performed. Where notice *in writing* to the consignee is one of the acts specified and, as here, no alternative is provided, notice *in writing* must be given or the free time does not begin to run. Notice given or acquired in some other manner is not sufficient. For one thing, it is not as readily susceptible of proof. Any doctrine of equivalence tends to laxity of practice with all its train of opportunities for preferential treatment. The carriers made their tariff rules with respect to constructive placement for their own benefit and convenience, and should be held to strict compliance as a pre-requisite to collecting demurrage on cars not in fact delivered.

Written notices of constructive placement of these cars were not sent or given complainants, as required by the applicable tariff. Accordingly, the demurrage charges were illegally assessed and complainants are entitled to reparation."

In *International Paper Company v. Director General*, as *Agent* (74 I. C. C. Rep. 34), demurrage assessed on 44 cars was held legally assessable for the reason that the complainant at all times had *actual notice* of the constructive placement of the cars in question, and it acquiesced in the absence of written notice.

Mr. Commissioner Hall, dissenting in part, said:

"They were not constructively placed or delivered. Written notices of inability to deliver because of conditions attributable to the consignee were not sent or given  
18 to the consignee, as provided by the applicable tariff, and, for reasons stated in my concurring expression in *Baltimore Trust Co. v. Director General*, 74, I. C. C. 22, such written notice was essential to accrual of defendant's right to collect demurrage.

Demurrage was illegally assessed on these 44 cars prior to the dates on which the free time would have expired if computed from the first 7 a. m. after dates of actual placement, and complainant is entitled to refund of the money which has been taken from it without right."

It will be noted that in the *Baltimore Trust Company* case, *supra*, the instant case of *Bartlesville Zinc Company* and the *International Paper Company* case, *supra*, the decisions were all rendered on the same day, to-wit, October 23, 1922, and by Division Three of the Commission, composed of Commissioners Hall, Eastman and Campbell.

IV. The controlling decision of the United States Supreme Court on the subject in question is found in the case of *Davis v. Henderson*, 266 U. S. 92, 45 Sup. Ct. Rep. 24, 69 L. Ed. 182, which was decided on October 27, 1924. Mr. Justice Brandeis delivered the opinion of the court and said:

"There is no claim that the rule requiring written notice is void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariff. 19 The rule was a part of the tariff." (Citing, among other cases, *Davis v. Cornwell*, 264 U. S. 560, 68 L. Ed. 848, 44 Sup. Ct. Rep. 410.)

V. In the case of *Campbell Construction Company v. La Crosse & Southeastern Ry. Co.*, 95 I. C. C. Rep., 603, 605, decided by the full Commission on January 6, 1925, the Commission in holding that demurrage charges on certain carload shipments were inapplicable because of lack of written notice as provided by tariff and awarding reparation, said:

"We have heretofore found that demurrage charges assessed *under similar circumstances* were applicable and were not unlawful. *Bartlesville Zinc Co. v. Director General*, 74, I. C. C. 26; *International Paper Co. v. Director General*, 74 I. C. C., 34.

But we view the doctrine of *Davis v. Henderson*, 266 U. S. 92, decided October 27, 1924, as controlling."

In support of its conclusion, the Commission quotes the following excerpt from the opinion of the court:



“There is no claim that the rule requiring written notice is void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariff. The rule was a part of the tariff.”

VI. In *Milne Lumber Company v. Michigan Central Rd. Co. et al.*, 118 I. C. C. Rep. 180, decided by the Commission on November 27, 1926, it was held that it was immaterial whether the complainant received notice otherwise that the shipment was unclaimed, for the tariff requirement that consignor be advised by wire could not be waived, such notice being a prerequisite to the accrual of the demurrage, and cited *Davis v. Henderson, supra*, and *Campbell Construction Company v. L. C. & S. Ry. Co., supra*.

VII. In *Western Bridge & Construction Company v. St. Louis-S. F. Ry. Co., et al.*, 118 I. C. C. Rep. 607, 609, the Commission stated:

“Actual notice, however, is not a ‘substantial compliance’  
• • • with a rule requiring written notice. (Citing, *Campbell Construction Co., supra*, and *Davis v. Henderson, supra*.)”

VIII. Assuming that the Commission’s order of dismissal of October 23, 1922, was erroneous in view of the subsequent decision of the United States Supreme Court in the case of *Davis v. Henderson, supra*, and the decision of the Commission in the case of *Campbell Construction Company v. La Crosse & Southeastern Ry. Co., supra*, and the other authorities herein cited, it necessarily follows that *there has been no final valid order issued in this case* and that, therefore, the Commission still retains jurisdiction of this proceeding with power to reopen the same and to render a decision in accordance with the law.

21 Wherefore, petitioner prays that a rehearing and reargument be granted in the above-entitled case and that the Commission find that the demurrage charges were unlawfully assessed in violation of the applicable pub-

lished tariff and that an order be entered granting the complainant the relief prayed for in its complaint heretofore filed herein.

Dated at Chicago, Illinois, May 7, 1927.

HARRY C. BARNES,  
*Attorney for Petitioner.*

111 West Jackson Boulevard, Chicago, Illinois.

ALAN C. McILVAINE,  
*Of Counsel.*

22 (EXHIBIT "B.")

Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 13th Day of June, A. D. 1927.

No. 11468.

BARTLESVILLE ZINC COMPANY

v.

DIRECTOR GENERAL, as Agent.

Upon consideration of the record in this proceeding and of complainant's third petition for rehearing, re-argument and reconsideration:

*It is ordered*, That said petition be, and it is hereby, denied.

By the Commission.

[SEAL.]

GEORGE B. McGINTY,  
*Secretary.*

23 *Rule to Show Cause.*

Filed November 8, 1927.

\* \* \* \* \*

Upon consideration of the petition filed in the above entitled cause, it is this 8th day of November, A. D. 1927,

Ordered that the defendant, Interstate Commerce Com-



mission, show cause on or before the 30th day of November, A. D. 1927, why the prayer of the petition should not be granted, and the writ of mandamus issued, compelling the defendant, Interstate Commerce Commission, to perform its ministerial duty in accordance with the provisions of the Interstate Commerce Act and to enter or cause to be entered in the complaint of Bartlesville Zinc Company vs. Director General as Agent, I. C. C. Docket No. 11468, an order awarding reparation to the petitioner as prayed for in its complaint filed therein, and to take such other action as by law required, in order to ascertain the amount of damages the petitioner is entitled to by way of reparation for the overcharges assessed against and paid by it, provided a copy of this order is served upon the said defendant on or before the 12th day of November, A. D. 1927.

By the Court.

WENDELL P. STAFFORD,  
*Justice.*

24

*Marshal's Return.*

Served copy of the within rule on Interstate Commerce Com. Bethusar Meyers—Acting Chairman—Personally Nov. 10—1927.

EDGAR C. SNYDER,  
*U. S. Marshal in and for  
the Dist. of Columbia,*  
By HAROLD SCOTT,  
*Deputy U. S. Marshal.*  
K.

*Answer of Interstate Commerce Commission.*

Filed November 29, 1927.

\* \* \* \* \*

The Interstate Commerce Commission, defendant in the above-entitled case, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I. Answering Paragraph 1 of the petition, the Commission admits that the allegations therein contained are true.

II. Answering Paragraph 2 of the petition, the Commission admits that the allegations therein contained are true, except that the Commission denies that it is charged with the  
25 duty of executing and enforcing the provisions of the Federal Control Act. In this connection, however, the Commission admits that certain authority is conferred and certain duties are imposed upon the Commission, particularly provisions contained in Section 10, of said Federal Control Act.

III. Answering the first subdivision of paragraph 3 of the petition, the Commission admits that a formal complaint was filed by petitioner in the Commission's office as alleged in the subdivision, but denies that the demurrage charges referred to in said subdivision were illegally assessed against petitioner. The Commission admits that the text of Section A of Rule 5 of the demurrage tariff referred to in said subdivision is correctly set forth in said subdivision, except that certain words and figures, namely, "See Rule 4 (Notification)," are omitted therefrom.

Answering the second subdivision of Paragraph 3 of the petition, the Commission admits that it made and issued the report and order of October 23, 1922, mentioned in said subdivision, and that said report and order contained statements, findings of fact and order substantially as set forth in said subdivision. In this connection, the Commission alleges that it, among other things, made statements and findings of fact in said report as follows:

Complainant owns and maintains within its plant enclosure at Blackwell a system of tracks connecting with the rails of the Atchinson, Topeka & Santa Fe, hereinafter called the Santa Fe, at a point on the latter's right of way which adjoins the southwestern corner of the enclosure. In addition to its main-line track the Santa Fe owns and maintains adjacent to the enclosure two sidings, hereinafter called tracks 1 and 2, approximately 3,000 and 2,000  
26 feet in length, respectively. There are no other industries in the vicinity of the plant and the evidence shows that tracks 1 and 2 were constructed to afford additional storage space for loaded and empty cars and to facilitate their handling to and from the plant. Cars were



at no time unloaded while upon those tracks and it appears that they were never intended to be used for that purpose. The Santa Fe is the only carrier serving complainant's plant. The St. Louis-San Francisco also reaches Blackwell, but shipments for complainant over that road are switched by the Santa Fe from the Blackwell yards to the plant, a distance of about 1 mile. Delivery at the plant is made without any charge in addition to the line-haul rates.

During the period in question complainant was engaged in supplying war material to the Government and received numerous carload shipments at Blackwell over the lines of both carriers. Upon arrival of each shipment at the Blackwell yards written notice identifying the car by initials and number, point of origin, and contents, was promptly given complainant. Without further notice the cars were moved to the plant, by either line-haul or switching engines of the Santa Fe, and generally were placed on tracks 1 and 2. After being there held for varying periods, they were removed, under circumstances hereinafter described, to unloading points within the plant. The charges assailed were assessed as though delivery had been made when the cars were placed on tracks 1 and 2. Settlements were made under the average agreement.

The applicable demurrage traiffs provided in part as follows:

#### Rule 3.—Computing Time.

Section B-1. On cars held for orders, time will be computed from the first 7 a. m. after the day on which notice of arrival is sent or given to the consignee. \* \* \*

Section D. On cars to be delivered on any other than public-delivery tracks, time will be computed from the first 7 a. m. after actual or constructive placement on such tracks. \* \* \*

#### Rule 4.—Notification.

Section A. Notice shall be sent or given consignee by carrier's agent in writing, or as otherwise agreed to by carrier and consignee, within twenty-four hours after arrival of cars and billing at destination, such notice to contain point of shipment, car initials and numbers, and the

contents, and, if transferred in transit, the initials and number of the original car. \* \* \*

27 Section C. Delivery of cars upon private or industrial interchange tracks, or written notice sent or given to consignee of readiness to so deliver, will constitute notification thereof to consignee.

Section D. In all cases where notice is required the removal of any part of the contents of a car by the consignee shall be considered notice thereof to the consignee.

#### Rule 5.—Placing Cars for Loading (Unloading).

Section A. When delivery of cars consigned or ordered to any other than public-delivery tracks or to industrial interchange tracks can not be made on account of the act or neglect of the consignee, or the inability of the consignee to receive, delivery will be considered to have been made when the cars were tendered. The carrier's agent must send or give the consignee written notice of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee. This will be considered constructive placement. See Rule 4 (Notification).

#### Rule 8.—Claims.

Section D. *Delayed or improper notice by carrier.* When notice has been sent or given in substantial compliance with the requirements as specified in these rules, the consignees shall not thereafter have the right to call in question the sufficiency of such notice unless within forty-eight hours from 7 a. m. following the day on which notice is sent or given he shall serve upon the delivering carrier a full written statement of his objections to the sufficiency of such notice.

A copy of said report and order of October 23, 1922, marked "Exhibit A," hereto attached and hereby made a part hereof, and the Commission refers the court to the text of said report and order for more full and complete information in the premises.

IV. Answering Paragraph 4 of the petition, the Commission denies that its action in dismissing the petitioner's



complaint was based upon an interpretation of law by the Commission which was contrary to a later construction of the same proposition of law by the United States Supreme Court, denies that it subsequently recognized such contrariety, and denies that it subsequently applied a contrary interpretation, as alleged in said paragraph.

V. Answering Paragraph 5 of the petition, the Commission denies that it either failed or refused to enter a final valid order, denies that it either failed or refused to enter an order pursuant to the Commission's findings of ultimate facts, and denies that it either failed or refused to enter an order in accordance with the law applicable thereto.

VI. Answering Paragraph 6 of the petition, the Commission admits that in said report it made the statements set forth in said paragraph, and admits that, as alleged, it found that the conduct of the parties constituted a substantial compliance with the rules contained in the demurrage tariff to which reference is made, but the Commission denies each of and all the other allegations contained in said paragraph.

VII. Answering the first subdivision of Paragraph 7 of the petition, the Commission denies that the cars therein referred to were not so placed as to permit of the accrual of demurrage charges within the meaning of the rules, including Section A of Rule 5, contained in the demurrage tariff to which reference is made in said subdivision.

29 Answering the second subdivision of Paragraph 7 of the petition, the Commission admits that, in said report of October 23, 1922, it made the statements set forth in said subdivision, but the Commission denies that petitioner's deductions from said statements are correct.

VIII. Answering Paragraphs 8 and 9 of the petition, the Commission alleges that none of the allegations contained in said paragraphs is either relevant or material, and that for this reason the Commission neither admits nor denies that any of said allegations is true.

IX. Answering Paragraph 10 of the petition, the Commission alleges that none of the allegations contained in said paragraph is either relevant or material. In this connection, however, the Commission denies that the pertinent facts in the Bartlesville Zinc Company case mentioned were substantially identical with the pertinent facts in the Balti-

more Trust Company case to which reference is made, and denies that action taken by the Commission in the Bartlesville Zinc Company case as compared with the Commission's action in the Baltimore Trust Company case constituted unjust discrimination.

X. Answering Paragraph 11 of the petition, the Commission admits that the allegations therein contained are true, except that the Commission denies that petitioner is entitled under the law to the reparation referred to in said paragraph.

30 XI. Answering Paragraph 12 of the petition, the Commission denies that in its report in the Campbell Construction Company case mentioned the Commission admitted that it had committed an error of law either in the Bartlesville Zinc Company case hereinbefore referred to or in any other case.

XII. Answering Paragraph 13 of the petition, the Commission denies that, as alleged in said paragraph, the petitioner has sustained damages in the sum of either \$50,000 or any other amount.

The Commission alleges that, subsequent to the filing of the petition herein in court, the Commission made and entered an order which is in words and figures as follows, namely:

*Order.*

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 21st Day of November, A. D., 1927.

No. 11468.

BARTLESVILLE ZINC COMPANY

v.

DIRECTOR GENERAL, as Agent.

Good cause appearing therefor:

*It is ordered*, That the above-entitled proceeding be, and it is hereby, reopened for further consideration on the record as made.

By the commission.

[SEAL.]

GEORGE B. MCGINTY,  
*Secretary.*



31 Wherefore the Commission prays that the petition wherein be dismissed.

INTERSTATE COMMERCE  
COMMISSION,  
By P. J. FARRELL,  
E. M. REIDY,  
*Attorneys.*

CITY OF WASHINGTON,  
*District of Columbia, ss:*

Joseph B. Eastman, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named defendant, and makes this affidavit on behalf of said Commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

JOSEPH B. EASTMAN.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia, this 29th day of November, 1927.

[NOTARIAL SEAL.]

EUGENE W. SUTER,  
*Notary Public.*

32

EXHIBIT A.

7985.

Interstate Commerce Commission.

No. 11468.

BARTLESVILLE ZINC COMPANY

v.

DIRECTOR GENERAL, as Agent.

33

No. 11468.

BARTLESVILLE ZINC COMPANY

v.

DIRECTOR GENERAL, as Agent.

Submitted November 14, 1921. Decided October 23, 1922.

Demurrage charges assessed at Blackwell, Okla., on carload shipments of various commodities found to have been

legally applicable and not otherwise unlawful. Complaint dismissed.

E. R. Rombauer and I. W. Preetorius for complainant.

T. J. Norton, F. E. Andrews, Cottingham & Hayes, Hunter L. Johnson, H. L. McCracken, and E. E. McInnes for defendant.

*Report of the Commission.*

Division 3, Commissioners Hall, Eastman, and Campbell.

EASTMAN, *Commissioner*:

This case was originally heard in July, 1920. Complainant filed exceptions to the report proposed by the examiner and following the oral argument upon these exceptions a further hearing was had. To the second proposed report no exceptions were filed. Both reports recommended dismissal of the complaint.

Complainant is a corporation engaged in the manufacture of zinc at Bartlesville, Okla. By complaint filed May 7, 1920, it alleges that the demurrage charges collected by defendant during the period from January to August, 1918, inclusive, on numerous carloads of ore, coal, and other commodities consigned to complainant at Blackwell, Okla., were illegal and unreasonable. We are asked to award reparation.

Complainant owns and maintains within its plant enclosure at Blackwell a system of tracks connecting with the rails of the Atchison, Topeka & Santa Fe, hereinafter called the Santa Fe, at a point on the latter's right of way which adjoins the southwestern corner of the enclosure. In addition to its main-line track the Santa Fe owns and maintains adjacent to the enclosure two sidings, hereinafter called tracks 1 and 2, approximately 3,000 and 2,000 feet in length, respectively. There are no other industries in the vicinity of the plant and the evidence shows that tracks 1 and 2 were constructed to afford additional storage space



for loaded and empty cars and to facilitate their handling to and from the plant. Cars were at no time unloaded while upon those tracks and it appears that they were never intended to be used for that purpose. The Santa Fe is the only carrier serving complainant's plant. The St. Louis-San Francisco also reaches Blackwell, but shipments for complainant over that road are switched by the Santa Fe from the Blackwell yards to the plant, a distance of about 1 mile. Delivery at the plant is made without any charge in addition to the line-haul rates.

During the period in question complainant was engaged in supplying war material to the Government and received numerous carload shipments at Blackwell over the lines of both carriers. Upon arrival of each shipment at the Blackwell yards written notice identifying the car by initials and numbers, point of origin, and contents, was promptly given complainant. Without further notice the cars were moved to the plant, by either line-haul or switching engines of the Santa Fe, and generally were placed on tracks 1 and 2. After being there held for varying periods, they were removed, under circumstances hereinafter described, to unloading points within the plant. The charges assailed were assessed as though delivery had been made when the cars were placed on tracks 1 and 2. Settlements were made under the average agreement.

The applicable demurrage tariffs provided in part as follows:

### Rule 3.—Computing time.

Section B-1. On cars held for orders, time will be computed from the first 7 a. m. after the day on which notice of arrival is sent or given to the consignee. \* \* \*

Section D. On cars to be delivered on any other than public-delivery tracks, time will be computed from the first 7 a. m. after actual or constructive placement on such tracks. \* \* \*

### Rule 4.—Notification.

Section A. Notice shall be sent or given consignee by carrier's agent in writing, or as otherwise agreed to by carrier and consignee, within twenty-four hours after

arrival of cars and billing at destination, such notice to contain point of shipment, car initials and numbers, and the contents, and, if transferred in transit, the initials and number of the original car. \* \* \*

Section C. Delivery of cars upon private or industrial interchange tracks, or written notice sent or given to consignees of readiness to so deliver, will constitute notification thereof to consignee.

Section D. In all cases where notice is required the removal of any part of the contents of a car by the consignee shall be considered notice thereof to the consignee.

#### Rule 5.—Placing Cars for Loading.

Section A. When delivery of cars consigned or ordered to any other than public-delivery tracks or to industrial interchange tracks can not be made on account of the act or neglect of the consignee, or the inability of the consignee to receive, delivery will be considered to have been  
35 made when the cars were tendered. The carrier's agent must send or give the consignee written notice of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee. This will be considered constructive placement. See Rule 4 (Notification).

#### Rule 8.—Claims.

Section D. *Delayed or improper notice by carrier.* When notice has been sent or given in substantial compliance with the requirements as specified in these rules, the consignees shall not thereafter have the right to call in question the sufficiency of such notice unless within forty-eight hours from 7 a. m. following the day on which notice is sent or given he shall serve upon the delivering carrier a full written statement of his objections to the sufficiency of such notice.

Complainant contends that there was at all times sufficient trackage space at unloading points within the plant to accommodate all cars upon arrival and, further, that if such space were not available defendant was required to give written notice of constructive placement in addition to the notice of arrival before demurrage could lawfully accrue.



It is not disputed that complainant had actual knowledge of the cars placed on track- 1 and 2. It made daily check and kept a written record of the initials, numbers, contents, etc., of such cars. In obtaining this record complainant's employee usually worked in conjunction with an employee of the defendant who made a similar check. Complainant occasionally, also, took samples of ore from the cars. No cars other than those for complainant were held on those tracks during the period in question. Witnesses for defendant testified that generally, before they were placed on tracks 1 and 2, all cars were weighed on track scales within complainant's plant and a written record of their weight made by one of complainant's employees. Complainant showed that of the cars on which demurrage accrued during the months of April to August, inclusive, from about 55 to 86 per cent were placed on tracks 1 and 2 before weighing.

Since 1916 the Santa Fe has maintained a switching engine and crew at complainant's plant with instructions to perform whatever switching service complainant requested. The crews assigned to the plant during the greater part of the time were familiar with its requirements and switched cars between tracks 1 and 2 and the plant without detailed instructions except when requested to spot particular cars. If the crews did not know where particular cars should be placed, they obtained instructions from complainant's yard foreman or his assistant. For a short period the plant switching was performed by a crew which had not theretofore served the plant and it placed cars for unloading only upon specific orders from complainant's yard foreman or his assistant.

36        There were certain established points of unloading within the plant for the various commodities received. Coal and coke were unloaded on the ground alongside certain tracks; ores and other commodities generally into bins or buildings. The actual capacity of the plant tracks exceeds somewhat that of tracks 1 and 2. As a general rule, no cars were placed on these tracks except at the established points of unloading; and such spotting was in accordance with complainant's instructions.

Complainant criticizes the switching service principally on the ground that the switching crews began work later

in the day than it desired. There is also some criticism to the effect that the time consumed in placing cars was excessive and that the crews were withdrawn from the plant to render service elsewhere. It is sought thus to show in a general way that cars were not placed for unloading in sufficient numbers to fully utilize the available track capacity or as frequently as desired.

The switching crews, as a rule, reported at the plant each morning shortly after complainant's employees had begun unloading cars. The latter worked an eight-hour day. The switching cars, with few exceptions, performed more than eight hours' service each day; and, barring a few occasions when ordered by defendant to perform other work, devoted substantially all of their time exclusively to spotting cars for complainant. Witnesses for complainant testified that ordinarily only one spot a day was provided, while a witness for defendant stated that when two spots were not made it was because of complainant's failure to unload the cars promptly, and that frequently as many as four spots a day were accorded shipments of ore. On cross-examination, witnesses for complainant testified that cars were generally placed where wanted and that the tracks at unloading points were usually filled.

No evidence was offered that the demurrage charges assessed were unreasonable in and of themselves, and the sole question is whether they were applicable under the provisions of the governing tariff. It is clear that under the conditions surrounding the switching of cars from tracks 1 and 2 to unloading points within the plant there was an arrangement, mutually recognized, whereby individual cars were placed at particular unloading points under the direction and control of complainant's yard foreman or his assistant; and that the detention of the cars on tracks 1 and 2 was attributable to complainant. As before stated, due notice of arrival was promptly given; and, in addition, complainant had actual knowledge at all times by daily check and written record of the placement and detention on tracks 1 and 2 of shipments consigned to it. No objection was offered to the method of handling this matter prior

37      to the filing of this complaint. In our opinion, the demurrage charges were assessed in substantial compliance with the provisions of the applicable tariffs.



We therefore find that the demurrage charges attacked were legally applicable and were not unlawful. An order dismissing the complaint will be entered.

HALL, *Commissioner*, dissenting:

Detention time on the cars here considered was computed from the first 7 a. m. after they were placed on tracks 1 and 2. Defendant apparently deemed such placement to be delivery. Cars which could not be placed on these tracks were held in the Blackwell yards and written notices of constructive placement were sent to complainant. But cars so placed were not in fact delivered. They could not be there unloaded and were later moved by defendant without additional charge to unloading points within complainant's plant.

Nor were the cars held by defendant "for orders." Demurrage was not assessed on that theory.

Written notice of inability to deliver because of conditions attributable to the consignee was not sent or given to the consignee, as provided by the applicable tariff. It follows that there was no constructive delivery or placement, for the reasons set forth in my concurring expression in *Baltimore Trust Co. v. Director General*, 74 I. C. C., 22.

Demurrage was illegally assessed and reparation should be awarded.

38

*Order.*

At a Session of the Interstate Commerce Commission, Division 3, Held at Its Office, in Washington, D. C., on the 23d day of October, A. D. 1922.

No. 11468

BARTLESVILLE ZINC COMPANY

v.

DIRECTOR GENERAL, as Agent.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the

date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*It is ordered*, That the complaint in this proceeding be, and it is hereby, dismissed.

By the commission, division 3.

[SEAL.]

GEORGE B. MCGINTY,  
*Secretary.*

39      *Reply of Petitioner to Answer of Defendant.*

Filed January 12, 1928.

\*      \*      \*      \*      \*      \*      \*

The Bartlesville Zinc Company, petitioner in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in defendant's answer contained, replying thereto, or to so much and/or such parts thereof as it is advised that it is material or necessary for it to reply unto, replying says:

That it admits that subsequent to the filing of its petition herein, defendant made and entered an order on, to-wit, the twenty-first day of November, A. D. 1927, re-opening for further consideration on the record as made the proceeding theretofore pending before it, entitled Bartlesville Zinc Company vs. Director-General, As Agent, I. C. C. Docket No. 11468, in words and figures, substantially as set forth in Paragraph XII of defendant's Answer heretofore filed herein, and avers

That said defendant entered said order of November 21, 1927, in said proceeding, I. C. C. Docket No. 11468, theretofore pending before it, re-opening said proceeding for further consideration upon the record as made, upon its own motion, and after it had finally disposed of said proceeding, theretofore pending before it, as set forth in its report and decision of October 23, 1922, (74 I. C. C. 26, et. seq.), in which it denied the complainant, petitioner herein, the relief sought, and after it had denied complainant's three several petitions for rehearing, reargument and re-



consideration of the said cause, the last of which was denied  
by virtue of its order of June 13, 1927, as set forth  
40 and alleged in the petition for Mandamus filed here-  
in, and after said defendant, Interstate Commerce  
Commission, had been duly served with notice of the pen-  
dency of this suit and ordered to show cause why the relief  
sought herein should not be granted.

Further replying to the answer of said defendant, peti-  
tioner avers that on, to-wit, the fifth day of December, A. D.  
1927, pursuant to and in furtherance of its said order of No-  
vember 21, 1927, said defendant, Interstate Commerce Com-  
mission, made a Supplemental Report in which it affirmed  
its previous decision of October 23, 1922, in said proceed-  
ing entitled Bartlesville Zinc Company vs. Director-Gen-  
eral, As Agent, I. C. C. Docket No. 11468, a copy of which  
said Supplemental Report and Decision of defendant is  
hereto attached and made a part hereof and marked, "Pe-  
titioner's Exhibit C"; and,

That, conceding that the defendant had authority, *pen-  
dente lite* this proceeding, to enter its said order of No-  
vember 21, 1927, re-opening for further consideration on  
the record as made said cause, entitled "Bartlesville Zinc  
Company vs. Director-General, As Agent, I. C. C. Docket  
No. 11468" for the purpose of correcting its error in deny-  
ing complainant therein the relief sought therein and for  
the purpose of performing its ministerial duty in accord-  
ance with the provisions of the Interstate Commerce Act  
and for the purpose of entering or causing to be entered  
in the cause of Bartlesville Zinc Company vs. Director-Gen-  
eral, As Agent, I. C. C. Docket No. 11468, an order award-  
ing reparation to the petitioner as prayed for in its com-  
plaint filed therein, and for the purpose of such other ac-  
tion as by law required, in order to ascertain the amount  
of damages the petitioner is entitled to by way of repara-  
tion for the overcharges assessed against and paid  
41 by it, yet, to the contrary notwithstanding, said de-  
fendant having failed to correct its error and hav-  
ing, by its said Supplemental Decision of December 5, 1927,  
affirmed its previous decision of October 23, 1922, afore-  
said, said order of said defendant, Interstate Commerce  
Commission, of November 21, 1927, and its Supplemental  
Report and Decision of December 5, 1927, aforesaid, are

wholly immaterial and irrelevant to the issues in this cause and have and are of no force and binding effect upon this Court.

Petitioner avers that in its said Supplemental Report and Decision of December 5, 1927, said defendant made certain findings of fact and/or conclusions of fact which are not in accordance with the evidence and the record as made in that it stated that, \* \* \*

“we are of the opinion that in any event there was a substantial compliance with Rule 5, Section A through the daily check of tracks 1 and 2 made jointly by complainant’s and defendant’s clerks. These two men went together to the tracks and one checked track 1 while the other checked track 2. Each then made a copy of the other’s record, and in this manner both complainant and defendant obtained complete written data as to the cars held on the tracks awaiting unloading. In thus making the check the two clerks acted jointly for both parties, and complainant thereby obtained written notice from defendant of cars which could not be delivered because of congestion in complainant’s yard.”

Whereas, in fact, the evidence and the record as made shows that no written constructive placement notices were given complainant on cars held on sidetracks 1 and 2, as required by the published tariff (Defendant’s Witness Walcher, Rec 122); that written constructive placement notices were given by the Santa Fe to the complainant only in those instances in which cars were being held by the car-

42      rier in its Blackwell Yards (Defendant’s Witness Walcher, Rec. 116; agreement of counsel, Rec. 78); that an employee of complainant and an employee of the carrier each made a daily check of cars on sidetracks 1 and 2, and that the record made by the railroad employee went to the railroad office and the record made by the Zinc Company’s employee went to its office (Defendant’s Witness Walcker, Rec. 111, and Defendant’s Witness Anderson, Rec. 129-133); that defendant’s (carrier’s) traveling demurrage auditor had instructed carrier’s witness Walcher, to give written notices of constructive placement of cars held on sidetracks 1 and 2 but that its general auditor there-



after told him such written notices were not necessary. (Defendant's Witness, Walcher, Rec. 119.)

Wherefore, petitioner denies and joins issue on each and every material allegation in said answer of said defendant, Interstate Commerce Commission, not herein and hereby expressly admitted, confessed and avoided, or controverted by the record as made in said cause entitled Bartlesville Zinc Company vs. Director-General, As Agent, I. C. C. Docket No. 11468, and prays, as in the first instance, for a Writ of Mandamus, directed to said defendant, Interstate Commerce Commission, commanding it forthwith to perform its ministerial duty in accordance with the provisions of the Interstate Commerce Act and to enter or cause to be entered in the cause of Bartlesville Zinc Company vs. Director-General, As Agent, I. C. C. Docket No. 11468, an order awarding reparation to this petitioner as prayed for in its complaint filed therein, and to take such other action as by law required, in order to ascertain the amount of damages the petitioner is entitled to by way of reparation for the overcharges assessed against and paid by it.

43 BARTLESVILLE ZINC COMPANY,  
By HARRY C. BARNES,  
*Its Attorney in Fact.*

HARRY C. BARNES,  
L. HAROLD SOTHORON,  
*Attorneys for Petitioner.*  
ALAN C. McILVANE,  
*Of Counsel.*

STATE OF ILLINOIS,  
*County of Cook, ss:*

Harry C. Barnes, being first duly sworn on oath, deposes and says, that he is the agent and attorney of the Bartlesville Zinc Company, the petitioner in the above-entitled cause; that he has read the foregoing Reply to the Answer of Defendant by him subscribed and that the several matters and things in said Reply contained are true, to the best of his knowledge, information and belief.

HARRY C. BARNES.

Subscribed and sworn to before me, a Notary Public within and for the County of Cook, State of Illinois, this second day of January, A. D. 1928.

[NOTARIAL SEAL.]

ALAN C. McILVAINE,  
*Notary Public.*

My commission expires on July 7, 1930.

44

PETITIONER'S EXHIBIT "C."

12802

Interstate Commerce Commission.

No. 11468.

BARTLESVILLE ZINC COMPANY

v.

DIRECTOR GENERAL, as Agent

Decided December 5, 1927.

Upon further consideration, demurrage charges collected from complainant at Bartlesville, Okla., during Federal control found to have been lawfully assessed. Original report, 74 I. C. C. 26, affirmed.

*Report of the Commission on Further Consideration.*

By the COMMISSION:

In the original report, 74 I. C. C. 26, division 3 found that demurrage charges on shipments of various commodities to complainant's plant at Bartlesville, Okla., during the period from January to August, 1918, were legally applicable and not unlawful, and the complaint was dismissed. Subsequently on December 11, 1922, March 5, 1925, and May 23, 1927, complainant filed petitions for rehearing and reargument, all of which were denied. To remove any doubt as to the reasons which prompted those denials we have deemed it desirable to reopen this proceeding on our



own motion for further consideration of the record as made.

In its last petition complainant stated that it did not seek to reopen the case on the facts but desired only a review of the question of law presented. It contended that the findings of division 3 were erroneous in the light of the Supreme Court's decision in *Davis v. Henderson*, 266 U. S. 92, and inconsistent with our findings in certain subsequent cases, notably *Campbell Construction Co. v. L. C. & S. E. Ry. Co.*, 95 I. C. C. 603. The case last mentioned involved the validity of demurrage charges on shipments subjected to constructive placement, where no written notice either of arrival or of such placement was sent to the consignee, who, however, had actual notice. On the authority of *Davis v. Henderson, supra*, in which it was held that a tariff rule, requiring written notice, could not be waived, we found that the charges here in issue were inapplicable and awarded reparation. In the report we stated that we had theretofore found that demurrage charges assessed under similar circumstances were applicable and not unlawful, citing the instant case and another.

The circumstances in this case and the *Campbell case* were similar in that each involved the lawfulness of demurrage charges on shipments which could not be  
45 delivered because of consignee's inability to receive them, and it was argued in each that the notice to the consignee was inadequate under the governing tariff. A reading of the two reports reveals that while the two cases resembled each other in a general way there were differences in detail and that the governing tariff rules were far from being the same. The shipments in the *Campbell case* were made in 1922 and were governed by the uniform demurrage code of 1919, whereas the rules in effect in 1918 were the 1916 rules. The differences in wording are shown by the following excerpts:

1916.

## Rule 4.—Notification.

Section A. Notice shall be sent or given consignee by carrier's agent in writing, or as otherwise agreed to by carrier and consignee, within 24 hours after arrival of cars and billing at destination, such notice to contain point of shipment, car initials and numbers, and the contents, and, if transferred in transit, the initials and number of the original car \* \* \*

Section D. In all cases where notice is required the removal of any part of the contents of a car by the consignee shall be considered notice thereof to the consignee.

## Rule 5.—Placing Cars for Loading.

Section A. When delivery of cars consigned or ordered to **any other** than public-delivery tracks or to industrial interchange tracks can not be made on account of the act or neglect of the consignee, or the inability of the consignee to receive, delivery will be considered to have been made when the cars were tendered. The carrier's agent must send or give the consignee written notice of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee. This will be considered constructive placement. See Rule 4 (Notification).

46

## Rule 8.—Claims.

Section D. *Delayed or improper notice by carrier.*—When notice has been sent or given in substantial compliance with the requirements as specified in these rules, the consignees shall not thereafter have the right to call in question the sufficiency of such notice unless within 48 hours from 7 a. m. following the day on which notice is sent or given, he shall serve upon the delivering carrier a full written statement of his objections to the sufficiency of such notice.

1919.

## Rule 4.—Notification.

Section A.—Notice of arrival shall be sent or given consignee or party entitled to receive same by this railroad's agent in writing or, in lieu thereof, as otherwise agreed to in writing by this railroad and consignee, within 24 hours after arrival of car and billing at destination, such notice to contain car initials and number, point of shipment, contents and if transferred in transit, the initial and number of original car. \* \* \*

Section D. In all cases where any part of the contents of a car has been removed by the consignee prior to the sending or giving of required notice, such removal shall be considered as notice of arrival.

## Rule 5.—Placing Cars for Unloading.

Section A-1. When delivery of a car consigned or ordered to an industrial interchange track or to other-than-a-public-delivery track cannot be made on account of the inability of the consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination or, if it cannot reasonably be accommodated there, at the nearest available hold point, and written notice that the car is held and that this railroad is unable to deliver will be sent or given to the consignee. This will be considered constructive placement. (See Rule 3, Sections D and E.)

## Rule 8.—Claims.

Section D. *Delayed or improper notice by this railroad.*—1. (a) When notice of arrival does not contain all the information specified in Rule 4, Section A, consignee shall not have the right to call in question the sufficiency of such notice, unless within the prescribed time he shall serve upon this railroad's agent a written statement of the omitted information required, in which event the time between receipt of such statement and the furnishing of the omitted information will not be computed against the consignee.



It will be noted that rule 4, section A, of the 1919 rules required notice of arrival in writing or, in lieu thereof, as otherwise agreed to in writing. In the *Campbell case* there was no written notice either of arrival or of constructive placement. Defendant's position in that case was—that although the notice of arrival did not fully comply with the letter of defendant's demurrage rules, the absence of written notice was not the proximate cause of delay in unloading and releasing the cars and did not in any way prejudice complainant in the premises, and that the giving of oral notice of the arrival of cars was according to a custom and understanding between complainant and defendant.

Since there was no written arrival notice or written agreement in lieu thereof, as required by the plain terms of the tariff, the holding of the Supreme Court in *Davis v. Henderson* manifestly was controlling.

In the instant case notices of arrival fully complying with rule 4 were promptly given. Assuming that additional notice was required for cars placed on tracks 1 and 2 under rule 5, section A, as complainant contends, there is ground for holding that the reference to rule 4 at the end of that section in the 1916 rules could be construed as authorizing by mutual agreement notice in some form other than writing, as provided in rule 4, section A. Furthermore, as pointed out in the original report, complainant occasionally took samples of ore from cars on tracks 1 and 2. Under rule 4, section D, this removal of part of the contents in such cases was equivalent to notice.

But it is unnecessary to express more definite opinions with respect to these matters, because we are of the opinion that in any event there was substantial compliance with rule 5, section A, through the daily check of tracks 1 and 2 made jointly by complainant's and defendant's clerks. These two

47      men went together to the tracks and one checked track 1 while the other checked track 2. Each then made a copy of the other's record, and in this manner both complainant and defendant obtained complete written data as to the cars held on the tracks awaiting unloading. In thus making the check the two clerks acted jointly for both parties, and complainant thereby obtained written notice from defendant of cars which could not be delivered

because of congestion in complainant's yard. Rule 8, section D, of the 1916 rules above quoted expressly authorized substantial compliance with requirements concerning notice, rather than literal compliance, unless the consignee made written objection to the sufficiency of such notice. The notice given complainant through the yard check was in substantial compliance with tariff rules, and as the sufficiency of such notice was not called in question within the time limited, it must be held to have been in accordance with tariff requirements.

In its last petition complainant also relied on *Milne Lumber Co. v. M. C. R. R. Co.*, 118 I. C. C. 580, and *Western Bridge & Construction Co. v. S. L.-S. F. Ry. Co.*, id. 607. In the first case it was held that a tariff rule requiring notice by wire to consignor of consignee's refusal of a shipment was prerequisite to the accrual of demurrage and could not be waived. In the second it was held that actual notice was not substantial compliance with a rule requiring written notice. We do not consider those findings inconsistent with our conclusions here.

Upon further consideration of all the facts we affirm the conclusion in the original report that the demurrage charges here in issue were assessed in accordance with tariff authority and were not unlawful.

Commissioners Hall, Aitchison, and Brainerd dissent.

By the commission.

136 I. C. C.

[SEAL.]

GEORGE B. MCGINTY,

Secretary.

48 Supreme Court of the District of Columbia.

Tuesday, May 15", 1928.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice presiding.

\* \* \* \* \*

Come now the parties hereto by their respective attorneys of record whereupon this cause comes on to be heard upon the petition filed herein, the rule to show cause issued the answer of the respondent and reply to said answer filed herein, and the same having been argued and submitted to the said court, it is upon consideration, ordered



and adjudged this 15th day of May, A. D., 1928, that the rule to show cause be and the same is hereby discharged, and the petition be and the same is hereby dismissed. It is further ordered and adjudged that respondent recover of petitioner its cost of defense, to be taxed by the clerk, and have execution thereof.

From the foregoing judgment, the petitioner, by its attorney, in open court, notes an appeal to the Court of Appeals, whereupon the maximum amount of an undertaking for costs is hereby fixed in the sum of one hundred (\$100.00) dollars with leave to deposit the sum of fifty (\$50.00) dollars in cash in lieu thereof.

*Memorandum.*

May 29, 1928.—Bond on appeal approved and filed.

49

*Assignment of Error.*

Filed May 29, 1928.

\* \* \* \* \*

The Court erred—

1. In discharging the rule to show cause and in dismissing plaintiff's petition.

L. HAROLD SOTHORON,  
*Attorney for Plaintiff.*

*Designation for Preparation of Record*

Filed May 29, 1928.

\* \* \* \* \*

Now comes Bartlesville Zinc Company, the appellant in the above-entitled cause and designates the parts of the record which it desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Petition for writ of mandamus, and exhibits attached thereto.

2. Rule to show cause.

3. Answer of defendant, and exhibit attached thereto.

4. Reply of plaintiff, and exhibit attached thereto.
5. Order of the Court discharging the Rule to show cause and dismissing plaintiff's petition and note of appeal.
6. Assignment of error.
7. Together with a copy of this designation.

L. HAROLD SOTHORON,  
*Attorney for Plaintiff.*

- 50      Receipt of a copy of the foregoing designation for preparation of record is hereby acknowledged.

EDWARD M. REIDY,  
*Attorney for Defendant.*

- 51      Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 50, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 74273 at Law, wherein Bartlesville Zinc Company, a corporation, is Petitioner and Interstate Commerce Commission is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 1st day of August, 1928.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,  
*Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 4793. Bartlesville Zinc Company, a corporation, Appellant, vs. Interstate Commerce Commission. Court of Appeals, District of Columbia. Filed Aug. 4, 1928. Henry W. Hodges, clerk.

(2731)



OCT 15 1928

**COURT OF APPEALS**

OF THE

**DISTRICT OF COLUMBIA**

BARTLESVILLE ZINC  
COMPANY, a Corporation,  
*Appellant,*

v.

INTERSTATE COMMERCE  
COMMISSION,

*Appellee.*

At Law.

No. 4793.

Mandamus.

Appeal from the Supreme Court of the District of  
Columbia to Review a Judgment Dismissing a Petition  
for a Writ of Mandamus Addressed to the Interstate  
Commerce Commission.

**BRIEF ON BEHALF OF APPELLANT.**

HARRY C. BARNES,

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Dated: Chicago, Ill. October 8, 1928.





## INDEX

|                                                                       | Page |
|-----------------------------------------------------------------------|------|
| STATEMENT OF THE FACTS.....                                           | 1    |
| Original proceedings before Interstate Commerce Commission .....      | 1    |
| Supplemental proceedings of Commission pendente lite this action..... | 8    |
| Proceedings before Supreme Court of District of Columbia .....        | 8    |
| STATEMENT OF THE ISSUE .....                                          | 12   |
| ASSIGNMENT OF ERROR .....                                             | 16   |
| MANDAMUS ONLY PROPER AND ADEQUATE REMEDY .....                        | 16   |
| BRIEF OF AUTHORITIES .....                                            | 22   |
| ARGUMENT .....                                                        | 43   |

## TABLE OF CASES.

|                                                                                              |            |
|----------------------------------------------------------------------------------------------|------------|
| Alan Wood, Iron & Steel Co. v. Pennsylvania Rd. Co., 24 I. C. C. Rep. 27.....                | 42         |
| American Creosoting Works, Ltd. v. Illinois C. Rd. Co., 15 I. C. C. Rep. 160.....            | 41         |
| American Radiator Co. v. Lehigh V. Rd. Co., 44 I. C. C. Rep. 361.....                        | 43, 54     |
| Arkansas Midland Rd. Co. v. Premier Cotton Mills, 153 S. W. 148.....                         | 42         |
| Armour Packing Co. v. United States, 209 U. S. 56 .....                                      | 35, 36     |
| Associated Jobbers of Los Angeles v. Atchison, T. & S. F. Ry. Co., 18 I. C. C. Rep. 310..... | 41, 42     |
| Baltimore Trust Co. v. Director General, As Agent, 74 I. C. C. Rep. 22.....                  | 44, 55, 56 |

ii.

|                                                                                                                    |                    |
|--------------------------------------------------------------------------------------------------------------------|--------------------|
| Banner Grain Co. v. Great Northern Ry. Co., 119 Minn. 71 .....                                                     | 42                 |
| Barrett v. Gimbel Bros., Inc., 141 C. C. A. 379.....                                                               | 48                 |
| Bartlesville Zinc Co. v. Director General, As Agent, 74 I. C. C. Rep. 26.....                                      | 2, 14, 44          |
| Bartlesville Zinc Company v. Director General, As Agent, 136 I. C. C. Rep. 57.....                                 | 8                  |
| Bartlesville Zinc Co. v. Interstate Commerce Commission, No. 74273, Supreme Court of the District of Columbia..... | 13                 |
| Beekman Lumber Co. v. Louisiana Ry. & Nav. Co., 19 I. C. C. Rep. 343.....                                          | 40                 |
| Bennisch v. Long Island Rd. Co., 25 I. C. C. Rep. 439 .....                                                        | 42                 |
| Campbell Construction Co. v. LaCrosse & S. E. Ry. Co., 95 I. C. C. Rep. 603.....                                   | 20, 24, 44, 54, 62 |
| Central Rd. Co. of N. J. v. Hite, 166 Fed. Rep. 976 .....                                                          | 42                 |
| Central West Coal & Lumber Co. v. Chicago, B. & Q. Rd. Co., 104 I. C. C. Rep. 452.....                             | 24, 46, 54         |
| Chicago & Alton Rd. Co. v. Kirby, 225 U. S. 155                                                                    | 38                 |
| Chicago, I. & L. Ry. Co. v. United States, 219 U. S. 486 .....                                                     | 36                 |
| Coomes & McGraw v. Chicago, M. & St. P. Ry. Co., 13 I. C. C. Rep. 192.....                                         | 41                 |
| Crescent Coal & Mining Co. v. Baltimore & O. Rd. Co., 20 I. C. C. Rep. 559.....                                    | 40, 41             |
| Crutchfield & Woolfolk v. Southern P. Co., 24 I. C. C. Rep. 651 .....                                              | 40                 |
| Davis v. Cornwell, 264 U. S. 560.....                                                                              | 21, 38             |
| Davis v. Henderson, 266 U. S. 92.....                                                                              | 21, 23, 38         |
| Delp Grain Co. v. Director General, As Agent, 59 I. C. C. Rep. 755.....                                            | 40                 |
| Eastern R. Co. v. Littlefield, 237 U. S. 140.....                                                                  | 48                 |



|                                                                                         |            |
|-----------------------------------------------------------------------------------------|------------|
| Ex parte Brown, 116 U. S. 401.....                                                      | 29         |
| Ex parte Connaway, 178 U. S. 421.....                                                   | 31         |
| Ex parte Harding, 219 U. S. 363.....                                                    | 29, 30     |
| Ex parte Hoard, 105 U. S. 578.....                                                      | 31         |
| Ex parte Metropolitan Water Company, 220 U.<br>S. 539 .....                             | 31         |
| Ex parte Newman, 14 Wall. 152.....                                                      | 29         |
| Ex parte Park Square Automobile Station, 224<br>U. S. 412 .....                         | 30         |
| Ex parte Roe, 234 U. S. 70.....                                                         | 31         |
| Ex parte Russell, 13 Wall. 664.....                                                     | 29         |
| Ex parte Slater, 246 U. S. 128.....                                                     | 31         |
| Ex parte United States, 242 U. S. 27.....                                               | 31         |
| Francisconi & Co. v. Baltimore & O. R. Co., 274<br>Fed. Rep. 687 .....                  | 48         |
| General Equipment Co. v. Atlantic C. L. Rd. Co.,<br>37 I. C. C. Rep. 620.....           | 39         |
| General Motors Corporation v. Director General,<br>As Agent, 100 I. C. C. Rep. 341..... | 24, 45, 54 |
| Germain Company v. New Orleans & Northeast-<br>ern Rd. Co., 17 I. C. C. Rep.....        | 40         |
| Great N. Ry. Co. v. Merchants Elevator Co., 259<br>U. S. 285 .....                      | 47, 48     |
| Great Northern Refining Co. v. Illinois C. Rd.<br>Co., 53 I. C. C. Rep. 481.....        | 40         |
| Gulf, C. & S. F. Ry. Co. v. Hefley, 158 U. S. 98....                                    | 35         |
| Herb Bros. & Martin v. Pittsburgh, C. C. & St.<br>L. Ry. Co., 42 I. C. C. Rep. 583..... | 40         |
| Higgins Lumber & Export Co. v. New Orleans,<br>G. N. Rd. Co., 51 I. C. C. Rep. 214..... | 39         |
| Hite v. Central R. of New Jersey, 96 C. C. A. 326                                       | 48         |
| Holland Aniline Co. v. Pere Marquette Rd. Co.,<br>55 I. C. C. Rep. 617.....             | 40         |

|                                                                                                                        |            |
|------------------------------------------------------------------------------------------------------------------------|------------|
| Hurlburt v. Lake S. & M. S. Ry. Co., 2 I. C. C.<br>Rep. 122 .....                                                      | 37         |
| Illinois C. Rd. Co. v. Mulberry Hill Coal Com-<br>pany, 238 U. S. 275.....                                             | 48         |
| Interstate Commerce Commission v. United<br>States, ex rel. Humboldt Steamship Co., 224<br>U. S. 474 .....             | 30, 31     |
| Interstate Commerce Commission v. Baltimore &<br>O. Rd. Co., 145 U. S. 263 .....                                       | 34         |
| Interstate Commerce Commission v. United<br>States, ex rel. Waste Merchants Association<br>of N. Y., 260 U. S. 32..... | 30, 31     |
| Ketchum Coal Co. v. District Ct., 48 Utah 342.....                                                                     | 31         |
| Knox County v. Aspinwall, 24 How. 376.....                                                                             | 30         |
| Lakewood Engineering Co. v. New York C. Rd.<br>Co., 259 Fed. Rep. 61.....                                              | 37         |
| Lane v. Hoglund, 244 U. S. 174.....                                                                                    | 31         |
| Lehigh V. Rd. Co. v. United States, 188 Fed. Rep.<br>879 .....                                                         | 39         |
| Louisell Pine & Hardwood Co. v. Chicago, R. I.<br>& P. Ry. Co., 132 I. C. C. Rep. 341.....                             | 24, 46, 54 |
| Louisville & N. Rd. Co. v. Cook Brewing Com-<br>pany, 223 U. S. 70.....                                                | 47         |
| Louisville & N. Rd. Co. v. Central Stock Yards<br>Co., 212 U. S. 132.....                                              | 43         |
| Louisville & N. Rd. Co. v. Maxwell, 227 U. S. 94                                                                       | 36         |
| Louisville & N. Rd. Co. v. Mottley, 219 U. S. 467                                                                      | 36         |
| Marbury v. Madison, 1 Cranch. 163.....                                                                                 | 30         |
| McNeill v. Southern Ry. Co., 202 U. S. 543.....                                                                        | 43         |
| Middle West Coal Co. v. Chesapeake & O. Ry.<br>Co., 41 I. C. C. Rep. 723.....                                          | 40         |
| Milne Lumber Co. v. Michigan C. Rd. Co., 118<br>I. C. C. Rep. 580.....                                                 | 24, 46, 54 |



|                                                                                           |        |
|-------------------------------------------------------------------------------------------|--------|
| Munroe & Son v. Michigan C. Rd. Co., 17 I. C.<br>C. Rep. 27 .....                         | 47     |
| National Elevator Co. v. Chicago, M. & St. P.<br>Ry. Co., 158 C. C. A. 558.....           | 48     |
| National Fire Proofing Co. v. Bellefonte C. Rd.<br>Co., 102 I. C. C. Rep. 345.....        | 40, 54 |
| National Refining Co. v. St. Louis, I. M. & S. Ry.<br>Co., 237 Fed. Rep. 347.....         | 42     |
| Newton Gum Co. v. Chicago, B. & Q. Rd. Co., 16<br>I. C. C. Rep. 341.....                  | 37     |
| New York Hay Exchange Association v. Penn-<br>sylvania Rd. Co., 14 I. C. C. Rep. 178..... | 41     |
| New York, N. H. & H. Rd. Co. v. Interstate Com-<br>merce Commission, 200 U. S. 361.....   | 35     |
| New York, N. H. & H. Rd. Co. v. Porter, 108<br>Mass. 499 .....                            | 42     |
| Norfolk & W. Rd. Co. v. Swift & Company, 63<br>Pa. Sup. Ct. 132 .....                     | 42     |
| Northport Smelting & Refining Co. v. Great N.<br>Ry. Co., 53 I. C. C. Rep. 641.....       | 39     |
| Pacific Coast Biscuit Co. v. Spokane, P. & S. Ry.<br>Co., 20 I. C. C. Rep. 546.....       | 38     |
| Pennsylvania Rd. Co. v. International Coal Min-<br>ing Co., 230 U. S. 184.....            | 37, 48 |
| Pennsylvania Rd. Co. v. Kittaning Iron & Steel<br>Mfg. Company, 253 U. S. 319.....        | 41, 48 |
| Pennsylvania Rd. Co. v. Puritan Coal Mining<br>Company, 237 U. S. 121.....                | 48     |
| Pennsylvania Rd. Co. v. Sonman Shaft Coal<br>Company, 242 U. S. 120.....                  | 48     |
| Phillips Company v. Grand Trunk W. Ry. Co.,<br>236 U. S. 662 .....                        | 47     |
| Pittsburgh, C. C. & St. L. Ry. Co. v. Nash, 43<br>Indiana 423 .....                       | 42     |

|                                                                                         |                 |
|-----------------------------------------------------------------------------------------|-----------------|
| Poor Grain Co. v. Chicago, B. & Q. Rd. Co., 12 I. C. C. 418.....                        | 37              |
| Porter v. St. Louis & S. F. Rd. Co., 15 I. C. C. Rep. 1 .....                           | 41              |
| Prairie Oil & Gas Co. v. Wabash Rd. Co., 45 I. C. C. Rep. 1 .....                       | 38              |
| Proctor & Gamble Co. v. United States, 225 U. S. 282 .....                              | 22              |
| Re Christensen Engineering Co., 194 U. S. 458 .....                                     | 29              |
| Re Hohorst, 150 U. S. 653.....                                                          | 29              |
| Re Parker, 131 U. S. 221.....                                                           | 29              |
| Re Pennsylvania Company, 137 U. S. 451.....                                             | 30              |
| Re Simons, 247 U. S. 231.....                                                           | 31              |
| Republic Coal Co. v. Chicago, St. P. M. & O. Ry. Co., 85 I. C. C. Rep. 331.....         | 40, 54          |
| Roberts v. United States, 176 U. S. 221.....                                            | 29              |
| Roessler & Hasslacher Chemical Co. v. Director General, 56 I. C. C. Rep. 441.....       | 40              |
| Rossie Iron Ore Co. v. New York, C. & H. R. Rd. Co., 17 I. C. C. Rep. 392.....          | 41              |
| St. Louis, I. M. & S. R. Co. v. Hasty & Son, 255 U. S. 252 .....                        | 48              |
| Schaefer & Sons v. Chicago, R. I. & P. Ry. Co., 18 I. C. C. Rep. 414.....               | 38              |
| Schuhle's Pure Grape Juice Co. v. Director General, As Agent, 63 I. C. C. Rep. 129..... | 39              |
| Seymour v. United States, 10 App. D. C. 567.....                                        | 30              |
| Sinclair Refining Co. v. Schaf, 275 Fed. Rep. 769 .....                                 | 39              |
| Swift & Company v. Hocking Valley Rd. Co., 243 U. S. 281.....                           | 42, 48, 49 note |
| Swift & Company v. United States, 255 Fed. Rep. 291 .....                               | 37              |
| Taxing District v. Loague, 129 U. S. 493.....                                           | 30              |
| Texas & P. Ry. Co. v. Mugg, 202 U. S. 242.....                                          | 35              |



vii.

|                                                                                                               |            |
|---------------------------------------------------------------------------------------------------------------|------------|
| Tioga Coal Co. v. Chicago, R. I. & P. Ry. Co.,<br>18 I. C. C. Rep. 414.....                                   | 40         |
| United States v. Alaska Steamship Company, 253<br>U. S. 113 .....                                             | 25         |
| United States, ex rel. Boynton v. Blaine, 139 U.<br>S. 306 .....                                              | 29         |
| United States v. Boutwell, 17 Wall. 604.....                                                                  | 30         |
| United States v. Denver & R. G. Rd. Co., 18 I.<br>C. C. Rep. 7 .....                                          | 40         |
| United States v. Denver & R. G. Rd. Co., 41 I.<br>C. C. Rep. 712 .....                                        | 40         |
| United States v. Fossatt, 21 How. 445.....                                                                    | 29         |
| United States ex rel. West v. Hitchcock, 19 App.<br>D. C. 333 .....                                           | 29         |
| United States, ex rel. Louisville Cement Company<br>v. Interstate Commerce Commission, 246 U.<br>S. 638 ..... | 31, 47     |
| Virginia v. Paul, 148 U. S. 107.....                                                                          | 29         |
| Virginia v. Rives, 100 U. S. 313.....                                                                         | 29         |
| Western Bridge & Construction Co. v. St. Louis-<br>S. F. Rd. Co., 118 I. C. C. Rep. 607.....                  | 24, 46, 54 |
| Wood v. New York, P. & N. Rd. Co., 53 I. C. C.<br>Rep. 183 .....                                              | 39         |
| Woodcock Company v. Atlantic C. L. Rd. Co.,<br>136 I. C. C. Rep. 419.....                                     | 24, 46, 54 |





# COURT OF APPEALS

OF THE

DISTRICT OF COLUMBIA

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BARTLESVILLE ZINC

COMPANY, a Corporation,  
*Appellant,*

v.

INTERSTATE COMMERCE  
COMMISSION,

*Appellee.*

At Law.

No. 4793.

Mandamus.

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---

Appeal from the Supreme Court of the District of Columbia to Review a Judgment Dismissing a Petition for a Writ of Mandamus Addressed to the Interstate Commerce Commission.

---

## BRIEF ON BEHALF OF APPELLANT.

---

### STATEMENT OF THE FACTS

#### Proceedings Before Interstate Commerce Commission.

On May 7, 1920, the Bartlesville Zinc Company filed with the Interstate Commerce Commission, hereinafter called the Commission, a formal complaint, Docket No. 11468, under the provisions of the Act to Regulate Commerce and Section 10 of the Federal Control Act, against the Director General, as Agent, in which it alleged that certain demurrage charges collected by the Director General, as Agent, during the period from January to August, 1918, inclusive, on numerous carloads of ore, coal, and other commodities consigned to

the Bartlesville Zinc Company at its plant located at Blackwell, Kay County, Oklahoma, were illegal and unreasonable and prayed an award of reparation, and which demurrage charges were declared to have been illegally assessed because of the absence of written notices of the constructive placements of the cars in question, in violation of the carrier's applicable demurrage tariff on file with the Commission, which tariff provided in part as follows:

“RULE 5—PLACING CARS FOR UNLOADING.

“Section A. When delivery of cars consigned or ordered to any other than public-delivery tracks or to industrial interchange tracks cannot be made on account of the act or neglect of the consignee, or the inability of the consignee to receive, delivery will be considered to have been made when the cars were tendered. The carrier's agents must send or give the consignee *written notice* of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee. This will be considered constructive placement.”

Thereafter, to-wit: on October 22, 1922, the Commission filed a report embodying its findings of fact and conclusions and entered an order dismissing the complaint upon the ground that the said demurrage charges attacked having been assessed in *substantial* compliance with the provisions of the applicable tariff, they were legally applicable and were not unlawful (*Bartlesville Zinc Company v. Director General, As Agent, No. 11468, 74 I. C. C. Rep. 26 et seq.*).

The findings of ultimate facts giving rise to the petitioner's complaint are set forth in the Commission's report, *74 I. C. C. Rep. 26 et seq.*, as follows:



“Complainant owns and maintains within its plant enclosure at Blackwell, a system of tracks connecting the rails of the Atchison, Topeka & Santa Fe, hereinafter called the Santa Fe, at a point on the latter's right of way which adjoins the southwestern corner of the enclosure. In addition to its main-line track, the Santa Fe owns and maintains adjacent to the enclosure two sidings, hereinafter called tracks 1 and 2, approximately 3,000 and 2,000 feet in length, respectively. There are no other industries in the vicinity of the plant and the evidence shows that tracks 1 and 2 were constructed to afford additional storage space for loaded and empty cars and to facilitate their handling to and from the plant. Cars were at no time unloaded while upon those tracks and it appears that they were never intended to be used for that purpose. The Santa Fe is the only carrier serving complainant's plant. The St. Louis-San Francisco also reaches Blackwell, but shipments for complainant over that road are switched by the Santa Fe from the Blackwell yards to the plant, a distance of about one mile. Delivery at the plant is made without charge in addition to the line-haul rates.

“During the period in question, complainant was engaged in supplying war material to the Government and received numerous carload shipments at Blackwell over the lines of both carriers. Upon arrival of each shipment at the Blackwell yards written notice identifying the car by initials and number, point of origin, and contents, was promptly given complainant. Without further notice the cars were moved to the plant, by either line-haul or switching engines of the Santa Fe, and generally were placed on tracks 1 and 2. After being there held for varying periods, they were removed, under circumstances hereinafter described, to unloading points within the plant. The charges assailed were assessed as though delivery had been made when

the cars were placed on tracks 1 and 2. Settlements were made under the average agreement.

"The applicable demurrage tariffs provided in part as follows:

"Rule 3.—Computing time.

"Section B-1. On cars held for orders, time will be computed from the first 7 a. m. after the day on which notice of arrival is sent or given to the consignee. \* \* \*

"Section D. On cars to be delivered on any other than public-delivery tracks, time will be computed from the first 7 a. m. after actual or constructive placement on such tracks. \* \* \*

"Rule 4.—Notification.

"Section A. Notice shall be sent or given consignee by carrier's agent in writing, or as otherwise agreed to by the carrier and consignee, within twenty-four hours after arrival of cars and billing at destination, such notice to contain point of shipment, car initials and numbers, and the contents, and, if transferred in transit, the initials and number of the original car. \* \* \*

"Section C. Delivery of cars upon private or industrial interchange tracks, or written notice sent or given to consignees of readiness to so deliver, will constitute notification thereof to consignee.

"Section D. In all cases where notice is required the removal of any part of the contents of a car by the consignee shall be considered notice thereof to the consignee.

"Rule 5.—Placing cars for loading\* (unloading).

"Section A. When delivery of cars consigned or ordered to any other than public-delivery tracks or to industrial interchange tracks can not be made

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\*In the printed report in this case, 74 I. C. C. 26, at 27, the caption is shown as follows: "Rule 5—Placing cars for loading". This is a typographical error and should be "Rule 5—Placing cars for unloading". The record as well as the governing tariff clearly indicates this error. The rules of the governing tariff are as follows: Rule 4 covering notification of arrival of cars; Rule 5 covering constructive placement of loaded cars; Rule 6 covering constructive placement of empty cars.



on account of the act or neglect of the consignee, or the inability of the consignee to receive, delivery will be considered to have been made when the cars were tendered. The carrier's agent must send or give the consignee written notice of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee. This will be considered constructive placement. See Rule 4 (notification).

“Rule 8.—Claims.

“Section D. *Delayed or improper notice by carrier.* When notice has been sent or given in substantial compliance with the requirements as specified in these rules, the consignees shall not thereafter have the right to call in question the sufficiency of such notice unless within forty-eight hours from 7 a. m. following the day on which notice is sent or given he shall serve upon the delivering carrier a full written statement of his objections to the sufficiency of such notice.

“Complainant contends that there was at all times sufficient trackage space at unloading points within the plant to accommodate all cars upon arrival and, further, that if such space were not available defendant was required to give written notice of constructive placement in addition to the notice of arrival before demurrage could lawfully accrue.

“It is not disputed that complainant had actual knowledge of the cars placed on tracks 1 and 2. It made daily check and kept a written record of the initials, numbers, contents, etc., of such cars. In obtaining this record, complainant's employee usually worked in conjunction with an employee of the defendant who made a similar check. Complainant occasionally, also, took samples of ore from the cars. No cars other than those of the complainant were held on those tracks during the period in question. Witnesses for defendant testified that

generally, before they were placed on tracks 1 and 2, all cars were weighed on track scales within complainant's plant and a written record of their weight made by one of complainant's employees. Complainant showed that of the cars on which demurrage accrued during the months of April to August, inclusive, from about 55 to 86 per cent were placed on tracks 1 and 2 before weighing.

"Since 1916 the Santa Fe has maintained a switching engine and crew at complainant's plant with instructions to perform whatever switching service complainant requested. The crews assigned to the plant during the greater part of the time were familiar with its requirements and switched cars between tracks 1 and 2 and the plant without detailed instructions except when requested to spot particular cars. If the crew did not know where particular cars should be placed, they obtained instructions from complainant's yard foreman or his assistant. For a short period the plant switching was performed by a crew which had not theretofore served the plant and it placed cars for unloading only upon specific orders from complainant's yard foreman or his assistant.

"There were certain established points of unloading within the plant for the various commodities received. Coal and coke were unloaded on the ground alongside certain tracks; ores and other commodities generally into bins or buildings. The actual capacity of the plant tracks exceeds somewhat that of tracks 1 and 2. As a general rule, no cars were placed on these tracks except at the established points of unloading; and such spotting was in accordance with complainant's instructions.

\* \* \*

"No evidence was offered that the demurrage charges assessed were unreasonable in and of themselves, and the sole question is whether they were applicable under the provisions of the governing



tariff. It is clear that under the conditions surrounding the switching of cars from tracks 1 and 2 to unloading points within the plant there was an arrangement, mutually recognized, whereby individual cars were placed at particular unloading points under the direction and control of complainant's yard foreman or his assistant; and that the detention of the cars on tracks 1 and 2 was attributable to complainant. As before stated, due notice of arrival was promptly given; and, in addition, complainant had actual knowledge at all times by daily check and written record of the placement and detention on tracks 1 and 2 of shipments consigned to it. No objection was offered to the method of handling this matter prior to the filing of this complaint. In our opinion the demurrage charges were assessed in substantial compliance with the provisions of the applicable tariffs.

"We therefore find that the demurrage charges attacked were legally applicable and were not unlawful. An order dismissing the complaint will be entered."

Thereafter, petitioner applied three times to the Commission for rehearing, reargument and reconsideration and asking that the Commission award to the petitioner the reparation to which it claimed to be entitled as prayed for in its complaint, all of which applications were denied.

Finally, on or about May 7, 1927, the petitioner filed with the Commission a formal demand for the entry of a valid order awarding to the petitioner the reparation to which it claimed to be entitled under the law (Transcript of Record p. 11). Thereafter, on June 13, 1927, the Commission refused to accede to the petitioner's demand and entered an order accordingly

(Transcript of Record p. 17). Then, this petition for a writ of mandamus was filed in the Supreme Court of the District of Columbia praying that the Commission be directed to perform its ministerial duty under the provisions of the Interstate Commerce Act and to enter or cause to be entered in the said cause an order awarding to the petitioner the reparation prayed for in its complaint and to take such other action as by law required in order to ascertain the amount of damages to which the petitioner is entitled by way of reparation for the overcharges alleged to have been assessed against and paid by it.

**Supplemental Proceedings of Commission  
Pendente Lite This Action.**

After the rule to show cause in this action had been served upon the Commission, it, upon its own motion, re-opened the proceeding for further consideration of the record as made. The Commission's supplemental report, dated December 5, 1927, and reported in *136 I. C. C. Rep. 57, et seq.*, is as follows:

“In the original report, 74 *I. C. C. 26*, Division 3 found that demurrage charges on shipments of various commodities to complainant's plant at Bartlesville, Okla., during the period from January to August, 1918, were legally applicable and not unlawful, and the complaint was dismissed. Subsequently on December 11, 1922, March 5, 1925, and May 23, 1927, complainant filed petitions for rehearing and reargument, all of which were denied. To remove any doubt as to the reasons which prompted those denials we have deemed it desirable to reopen this proceeding on our own motion for further consideration of the record as made.



In its last petition complainant stated that it did not seek to reopen the case on the facts but desired only a review of the question of law presented. It contended that the findings of Division 3 were erroneous in the light of the Supreme Court's decision in *Davis v. Henderson*, 266 U. S. 92, and inconsistent with our findings in certain subsequent cases, notably *Campbell Construction Co. v. L. C. & S. E. Ry. Co.*, 95 I. C. C. 603. The case last mentioned involved the validity of demurrage charges on shipments subjected to constructive placement, where no written notice either of arrival or of such placement was sent to the consignee, who, however, had actual notice. On the authority of *Davis v. Henderson*, *supra*, in which it was held that a tariff rule, requiring written notice, could not be waived, we found that the charges there in issue were inapplicable and awarded reparation. In the report we stated that we had theretofore found that demurrage charges assessed under similar circumstances were applicable and not unlawful, citing the instant case and another.

The circumstances in this case and the *Campbell case* were similar in that each involved the lawfulness of demurrage charges on shipments which could not be delivered because of consignee's inability to receive them, and it was argued in each that the notice to the consignee was inadequate under the governing tariff. A reading of the two reports reveals that while the two cases resembled each other in a general way, there were differences in detail and that the governing tariff rules were far from being the same. The shipments in the *Campbell case* were made in 1922 and were governed by the uniform demurrage code of 1919, whereas the rules in effect in 1918 were the 1916 rules. The differences in wording are shown by the following excerpts:

## 1916

## Rule 4. Notification.

Section A. Notice shall be sent or given consignee by carrier's agent in writing, or as otherwise agreed to by carrier and consignee, within 24 hours after arrival of cars and billing at destination, such notice to contain point of shipment, car initials and numbers, and the contents, and, if transferred in transit, the initials and number of the original car. \* \* \*

Sections D. In all cases where notice is required the removal of any part of the contents of a car by the consignee shall be considered notice thereof to the consignee.

## Rule 5. Placing cars for loading.

Section A. When delivery of cars consigned or ordered to any other than public-delivery tracks or to industrial interchange tracks can not be made on account of the act or neglect of the consignee, or the inability of the consignee to receive, delivery will be considered to have been made when the cars were tendered. The carrier's agent must send or give the consignee written notice of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee. This will be considered constructive placement. See Rule 4 (Notification).

## 1919

## Rule 4. Notification.

Section A. Notice of arrival shall be sent or given consignee or party entitled to receive same by this railroad's agent in writing or, in lieu thereof, as otherwise agreed to in writing by this railroad and consignee, within 24 hours after arrival of car and billing at destination, such notice to contain car initials and number, point of shipment, contents and if transferred in transit, the initials and number of original car. \* \* \*

Section D. In all cases where any part of the contents of a car has been removed by the consignee prior to the sending or giving of required notice, such removal shall be considered as notice of arrival.

## Rule 5. Placing Cars for Unloading.

Section A-1. When delivery of a car consigned or ordered to an industrial interchange track or to other-than-a-public delivery track cannot be made on account of the inability of the consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination or, if it cannot reasonably be accommodated there, at the nearest available hold point, and written notice that the car is held and that this railroad is unable to deliver will be sent or given to the consignee. This will be considered constructive placement. (See Rule 3, Sections D and E.)



## Rule 8. Claims.

## Section D. Delayed or improper notice by carrier.

When notice has been sent or given in substantial compliance with the requirements as specified in these rules, the consignees shall not thereafter have the right to call in question the sufficiency of such notice unless within 48 hours from 7 a. m. following the day on which notice is sent or given, he shall serve upon the delivering carrier a full written statement of his objections to the sufficiency of such notice.

## Rule 8. Claims.

## Section D. Delayed or improper notice by this railroad.

1. (a) When notice of arrival does not contain all the information specified in Rule 4, Sec. A, consignee shall not have the right to call in question the sufficiency of such notice, unless within the prescribed free time he shall serve upon this railroad's agent a written statement of the omitted information required, in which event the time between receipt of such statement and the furnishing of the omitted information will not be computed against the consignee.

It will be noted that Rule 4, Section A, of the 1919 rules required notice of arrival in writing or, in lieu thereof, as otherwise agreed to in writing. In the *Campbell case* there was no written notice either of arrival or of constructive placement. Defendant's position in that case was—

that although the notice of arrival did not fully comply with the letter of defendant's demurrage rules, the absence of written notice was not the proximate cause of delay in unloading and releasing the cars and did not in any way prejudice complainant in the premises, and that the giving of oral notice of the arrival of cars was according to a custom and understanding between complainant and defendant.

Since there was no written arrival notice or written agreement in lieu thereof, as required by the plain terms of the tariff, the holding of the Supreme Court in *Davis v. Henderson* manifestly was controlling.

In the instant case notices of arrival fully complying with Rule 4 were promptly given. Assum-

ing that additional notice was required for cars placed on tracks 1 and 2 under Rule 5, Section A, as complainant contends, there is ground for holding that the reference to Rule 4 at the end of that section in the 1916 rules could be construed as authorizing by mutual agreement notice in some form other than writing, as provided in Rule 4, Section A. Furthermore, as pointed out in the original report, complainant occasionally took samples of ore from cars on tracks 1 and 2. Under Rule 4, Section D, this removal of part of the contents in such cases was equivalent to notice.

But it is unnecessary to express more definite opinions with respect to these matters, because we are of the opinion that in any event there was substantial compliance with Rule 5 Section A through the daily check of tracks 1 and 2 made jointly by complainant's and defendant's clerks. These two men went together to the tracks and one checked track 1 while the other checked track 2. Each then made a copy of the other's record, and in this manner both complainant and defendant obtained complete written data as to the cars held on the tracks awaiting unloading. In thus making the check the two clerks acted jointly for both parties, and complainant thereby obtained written notice from defendant of cars which could not be delivered because of congestion in complainant's yard. Rule 8 Section D of the 1916 rules above quoted expressly authorized substantial compliance with requirements concerning notice, rather than literal compliance, unless the consignee made written objection to the sufficiency of such notice. The notice given complainant through the yard check was in substantial compliance with tariff rules, and as the sufficiency of such notice was not called in question within the time limited, it must be held to have been in accordance with tariff requirements.



In its last petition complainant also relied on *Milne Lumber Co. v. M. C. R. R. Co.*, 118 I. C. C. 580, and *Western Bridge & Construction Co. v. S. L.-S. F. Ry. Co.*, *id.* 607. In the first case it was held that a tariff rule requiring notice by wire to consignor of consignee's refusal of a shipment was prerequisite to the accrual of demurrage and could not be waived. In the second it was held that actual notice was not substantial compliance with a rule requiring written notice. We do not consider those findings inconsistent with our conclusions here.

Upon further consideration of all the facts we affirm the conclusion in the original report that the demurrage charges here in issue were assessed in accordance with tariff authority and were not unlawful.

Commissioners Hall, Aitchison, and Brainerd dissent.

By the Commission."

### **Proceedings Before Supreme Court of District of Columbia.**

The Commission having denied the complainant's demand for the entry of an order awarding reparation, petition for a writ of mandamus was filed in the Supreme Court of the District of Columbia on November 8, 1927, praying that the Commission be directed to grant the relief sought (Transcript of Record, p. 2). The case was docketed as No. 74273, at law.

The Court, upon consideration of the petition, on November 8, 1927, issued a rule to show cause against

the Commission ordering that it show cause on or before November 30, 1927, why the prayer of the petition should not be granted, and the writ of mandamus issued, compelling the defendant, Commission, to perform its *ministerial* duty in accordance with the provisions of the Interstate Commerce Act and to enter or cause to be entered in the complaint of *Bartlesville Zinc Company v. Director General, As Agent, I. C. C. Docket No. 11468*, an order awarding reparation to the petitioner as prayed for in its complaint filed therein, and to take such other action as by law required, in order to ascertain the amount of damages the petitioner is entitled to by way of reparation for the overcharges assessed against and paid by it, provided a copy of the order be served upon the defendant, Commission, on or before November 12, 1927 (Transcript of Record, p. 17).

The order to show cause having been seasonably served upon the defendant, Commission, and due return made, the Commission filed its certain answer to said petition, in which, after numerous admissions and denials, it set forth, in paragraph XII thereof, a plea in suspension of the action in which it stated that subsequent to the filing of the petition (herein), on, to-wit: November 21, 1927, the Commission had made and entered an order in the case of *Bartlesville Zinc Company v. Director General, As Agent, No. 11468*, directing that the proceeding be reopened for further consideration on the record as made before it (Transcript of Record, p. 18).

Thereafter, on, to-wit: December 5, 1927, the Commission filed a supplemental report in said case in which it affirmed its original decision, holding that



the notice acquired by the complainant through the check of the carrier's tracks 1 and 2 was a *substantial* compliance with the carrier's tariff requiring *written* notice and that, therefore, the charges were assessed *in accordance with tariff authority* and were not unlawful (136 I. C. C. Rep. 57; Transcript of Record, p. 35).

No further pleading having been filed in Court by the defendant, Commission, the petitioner tendered issue upon the defendant's answer and said supplemental report by way of reply (Transcript of Record, p. 31). The petitioner, in its reply, questioned the right of the defendant, Commission, *pendente lite* this proceeding, to enter its said order of November 21, 1927, reopening said cause upon the record as made, *excepting* for the purpose of correcting its alleged error in denying the complainant therein the relief therein sought and for the purpose of performing its ministerial duty in accordance with the provisions of the Interstate Commerce Act and for the purpose of entering or causing to be entered in said cause an order awarding reparation to the petitioner as prayed for in its complaint filed therein, and for the purpose of such other action as by law required in order to ascertain the amount of damages the petitioner is entitled to by way of reparation for the overcharges assessed against and paid by it, in obedience to the Court's order to show cause (Transcript of Record, p. 32).

The reply of the petitioner attacked the materiality and relevancy of the Commission's supplemental report upon the theory that although the Commission had the right to reopen the proceeding, *pendente lite*

the Court action, for the purpose of taking *poenitentiary* action, yet in view of the fact that the Commission failed to take such action, but on the contrary affirmed its original decision in the case, its order of November 21, 1927, reopening the proceeding and its supplemental report and decision thereunder of December 5, 1927, are wholly immaterial and irrelevant to the issues in this cause and have and are of no force or binding effect upon the Court; as otherwise, it would be possible for the Commission to defeat the Court's jurisdiction by the simple expedient of reopening a proceeding *pendente lite* the Court action, but without any intention of affording the relief demanded. The petitioner's attack upon the materiality and relevancy of the Commission's supplemental report and decision is based upon the further ground that the action in mandamus being necessarily based upon the Commission's findings of ultimate facts and those facts being *res adjudicata* and binding upon all parties, the *status quo* must be maintained until a judicial determination of the issues involved in the Court action. *Pendente lite nihil innovetur*. Any other theory would produce endless confusion.

The reply of the petitioner further controverted certain findings of fact and conclusions of law contained in the Commission's supplemental order and decision of December 5, 1927, as not being in accordance with the evidence and record made in the proceeding (Transcript of Record, pp. 33, 34). (*See note at foot of p. 49.*)

The reply of the petitioner finally denies and joins issue on each and every material allegation in the answer of the defendant, Commission, not expressly ad-



mitted or confessed and avoided in such reply, or controverted by the record as made in *Bartlesville Zinc Company v. Director General, As Agent, No. 11468, 74 I. C. C. 26, et. seq.* and prays, as in the first instance, for a writ of mandamus directed to the Commission to afford the petitioner the relief sought (Transcript of Record, p. 34).

The cause was heard by the Supreme Court of the District of Columbia upon the petition, answer and reply; and that Court dismissed the petition upon the ground that the petitioner had not made out a case for a peremptory writ of mandamus. The case is here on appeal.

### STATEMENT OF THE ISSUE

The gravamen of this action is the failure and refusal of the defendant, Interstate Commerce Commission, to enter a final valid order, pursuant to its findings of ultimate facts and in accordance with the law applicable thereto, as will authorize a refund to the petitioner of the amount of *overcharges* paid by it.

*Written notices* of the carrier's inability to deliver the cars in question because of conditions attributable to the consignee (petitioner) were not sent or given to it by the carrier's agent, as provided by the applicable tariff, which requirement reads as follows:

“Rule 5—Placing cars for unloading.

“Section A. When delivery of cars consigned or ordered to any other than public-delivery tracks or to industrial interchange tracks cannot be made on account of the act or neglect of the consignee, or the inability of the consignee to receive, de-

livery will be considered to have been made when the cars were tendered. The carrier's agent must send or give the consignee *written notice* of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee. This will be considered constructive placement" (74 I. C. C. Rep. 26, 27, 28).

The Commission held as follows:

"No evidence was offered that the demurrage charges assessed were unreasonable in and of themselves, and the *sole question is whether they were applicable under the provisions of the governing tariff*. It is clear that under the conditions surrounding the switching of cars from tracks 1 and 2 to unloading points within the plant there was *an arrangement, mutually recognized*, whereby individual cars were placed at particular unloading points under the direction and control of complainant's yard foreman or his assistant; and that the detention of the cars on tracks 1 and 2 was attributable to complainant. As stated before, due notice of *arrival* was promptly given; and, in addition, *complainant had actual knowledge* at all times by daily check and written record of the placement and detention on tracks 1 and 2 of shipments consigned to it" (74 I. C. C. Rep. 26, 29).

The Commission further held as follows:

"The demurrage charges were assessed in *substantial* compliance with the provisions of the applicable tariffs" (74 I. C. C. Rep. 26, 30).

The petitioner contends that the Commission accepted the conduct of the parties as constituting a *substantial* compliance with the published tariff in lieu of the *written notice* specifically required from the



carrier by such tariff; that all of the cars in question were consigned to the petitioner to its private tracks within its plant enclosure and not to public-delivery tracks or to industrial interchange tracks; and, that there was no *constructive placement*, so as to permit the accrual of demurrage charges within the meaning of Rule 5, Section A of the applicable tariff, hereinbefore set forth, in the absence of the required *written notice*.

That the following findings of ultimate facts made by the Commission in its report are to the effect that all of the cars in question were consigned to the petitioner's *private tracks within its plant enclosure*, and not to public-delivery tracks or to industrial interchange tracks:

“Complainant owns and maintains within its plant enclosure at Blackwell a system of tracks connecting with the rails of the Atchison, Topeka & Santa Fe, hereinafter called the Santa Fe, at a point on the latter's right of way which adjoins the southwestern corner of the enclosure. In addition to its main-line track the Santa Fe owns and maintains adjacent to the enclosure two sidings, hereinafter called tracks 1 and 2, approximately 3,000 and 2,000 feet in length, respectively. There are no other industries in the vicinity of the plant, and the evidence shows that tracks 1 and 2 were constructed to afford additional *storage space* for loaded and empty cars and to facilitate their handling to and from the plant (p. 26). Cars were at no times unloaded while upon those tracks and it appears that they were never intended to be used for that purpose. The Santa Fe is the only carrier serving the complainant's plant. The St. Louis-San Francisco also reaches Blackwell, but shipments for complainant over that road are switched

by the Santa Fe from the Blackwell yards to the plant, a distance of about one mile. Delivery at the plant is made without any charge in addition to the line-haul rates. \* \* \* Upon arrival of each shipment at the Blackwell yards written notice identifying the car by initials and number, point of origin and contents, was promptly given complainant. Without further notice the cars were moved to the plant, by either line-haul or switching engine of the Santa Fe, and generally were placed on tracks 1 and 2. After being there held for varying periods, they were removed under circumstances hereinafter described, to unloading points within the plant \* \* \* (p. 27). Since 1916 the Santa Fe has maintained a switching engine and crew at complainant's plant with instructions to perform whatever switching service complainant requested. The crews assigned to the plant during the greater part of the time were familiar with its requirements and switched cars between tracks 1 and 2 and the plant without detailed instructions except when requested to spot particular cars. If the crew did not know where particular cars should be placed, they obtained instructions from complainant's yard foreman or his assistant (p. 28). \* \* \* There were certain established points of unloading within the plant for the various commodities received. \* \* \* The actual capacity of the plant tracks exceed somewhat that of tracks 1 and 2. As a general rule, no cars were placed on those tracks except at the established points of unloading; and such spotting was in accordance with complainant's instructions'' (p. 29).

That the Commission admitted its erroneous decision in the case at bar in its subsequent decision in the case of *Campbell Construction Company v. La Crosse & Southeastern Ry. Co.*, 95 I. C. C. Rep. 603.



605, decided by the full Commission on January 6, 1925, wherein it held that demurrage charges assessed on certain carload shipments were inapplicable because of *lack of written notice* as provided by the applicable tariff and awarded reparation accordingly, stating:

“We have heretofore found that demurrage charges assessed *under similar circumstances* were applicable and were not unlawful. *Bartlesville Zinc Co. v. Director General*, 74 I. C. C. 26; *International Paper Co. v. Director General*, 74 I. C. C. 34. But we view the doctrine of *Davis v. Henderson*, 266 U. S. 92, decided October 27, 1924, as controlling.”

In further support of its conclusion, the Commission quoted the following excerpt from the opinion of the United States Supreme Court in *Davis v. Henderson*, *supra*, (45 Sup. Ct. Rep. 24, 69 L. Ed. 182).

“There is no claim that the rule requiring written notice is void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariff. The rule was a part of the tariff” (*citing, among other cases, Davis v. Cornwell*, 264 U. S. 560; 68 L. Ed. 848; 44 Sup. Ct. Rep. 410).

The maxim *in consimili casu, consimile debet esse remedium* applies here.

### ASSIGNMENT OF ERROR.

The Court erred in discharging the rule to show cause and in dismissing plaintiffs' petition. (Transcript of Record, p. 40).

**MANDAMUS ONLY PROPER AND  
ADEQUATE REMEDY.**

There is no *statutory* provision for a judicial review of a negative order of the Interstate Commerce Commission, by way of appeal, writ of error or otherwise, so far as the complaining shipper is concerned. (*Proctor & Gamble Company v. United States* [1912], 225 U. S. 282; 56 L. Ed. 1091; 32 Sup. Ct. Rep. 761.)

However, in view of the *Commission's error in the application of the rules of law to the construction of the demurrage tariff* involved in this case, the petitioner could have subsequently proceeded in court in a proper action against the carrier for the recovery of its alleged damages, basing its action upon the Commission's findings of ultimate facts, as contained in its published report, which findings of the Commission would have constituted *prima facie* evidence of the facts therein stated. The ultimate facts, as found by the Commission, being properly averred, there would have been presented for judicial determination the same character of question as is involved in this proceeding, viz., the question of law involving the construction of Rule 5, Section A, of the published interstate demurrage tariff. The determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. The sole question being one of law in the construction of the tariff, preliminary resort to the Commission was unnecessary. The court's action in the construction of the tariff would *a priori*, constitute a judicial review of the Commission's decision and in



that aspect of the matter would be *in the nature of an error proceeding*. But would it have been proper to have pursued such judicial remedy and thereby place upon the court the burden of determining matters that should have been disposed of by the Commission, especially in view of the Commission's admitted error of law and its arbitrary refusal to apply the correct rule of law to the Bartlesville Zinc Company Case while so doing in numerous other cases? The petitioner rightfully selected the Commission as its forum and *the Commission was duty bound to dispose of the case according to law*. Its arbitrary failure and refusal to do so should be made the basis of a peremptory writ of mandamus to compel it to do so, instead of the subject-matter of an original suit in the court whereby there is presented a *moot* question of law for judicial determination. The following historical antecedents of this case clearly indicate the character of remedy to be invoked therein.

On October 23, 1922, the Interstate Commerce Commission dismissed the complaint of petitioner, appellant herein, and thereafter denied various petitions for rehearing.

On October 27, 1924, the United States Supreme Court decided the case of *Davis v. Henderson* (266 U. S. 92, 45 Sup. Ct. Rep. 24, 69 L. Ed. 182) and held:

“There is no claim that the rule requiring written notice is void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariff. The rule was a part of the tariff.”

Thereafter, to-wit: on January 6, 1925, the Commission in the case of *Campbell Construction Company v. La Crosse & Southeastern Ry. Co.*, 95 I. C. C. Rep. 603, 605, admitted its erroneous decision in the *Bartlesville Zinc Company Case*, 74 I. C. C. Rep. 26, in the following language:

“We have heretofore found that demurrage charges assessed under *similar circumstances* were applicable and were not unlawful. *Bartlesville Zinc Co. v. Director General*, 74 I. C. C. 26; *International Paper Co. v. Director General*, 74 I. C. C. 34. But we view the doctrine of *Davis v. Henderson*, 266 U. S. 92, decided October 27, 1924, as controlling.”

Since the decision of the Commission in *Campbell Construction Co.*, *supra*, it has consistently applied the doctrine enunciated by the Supreme Court in *Davis v. Henderson*, *supra*, in the following cases:

*General Motors Corporation v. Director General, as Agent*, (1925) 100 I. C. C. Rep. 341, 344.

*Central West Coal & Lumber Co. v. Chicago, B. & Q. Rd. Co.* (1925), 104 I. C. C. Rep. 452, 453.

*Milne Lumber Company v. Michigan Central Rd. Co.* (1926), 118 I. C. C. Rep. 580, 582.

*Western Bridge & Construction Company v. St. Louis-San Francisco Ry. Co.* (1926) 118 I. C. C. Rep. 607, 609.

*Louisell Pine & Hardwood Company, Inc. v. Chicago, R. I. & P. Ry. Co.* (1927) 132 I. C. C. Rep. 341.

*Woodcock Company v. Atlantic Coast Line Rd. Co.* (1927) 136 I. C. C. Rep. 419, 421.



Finally, on or about May 7, 1927, petitioner, appellant herein, filed with the Commission a formal demand for the entry of a valid order consonant with the decision of the Supreme Court in *Davis v. Henderson, supra*, awarding to the petitioner reparation for the *overcharges* paid by it in accordance with its *ministerial* duty under the Act. Thereafter, on June 13, 1927, the Commission denied the relief sought.

The action of the Commission in *Campbell Construction Company, supra*, admitting its erroneous decision in the *Bartlesville Zinc Company Case*, and its subsequent, consistent application of the law announced by the Supreme Court in *Davis v. Henderson, supra*, rendered the question of law involved in this case a *moot* one for the purpose of judicial determination. (*United States v. Alaska Steamship Company* [1920], 253 U. S. 113, 40 Sup. Ct. Rep. 448, 64 L. Ed. 808, 809.)

This is not a case of misinterpretation of law by the Commission, because it recognized the correct rule of law in *Campbell Construction Company, supra*, wherein it admitted its error in the *Bartlesville Zinc Company Case*, and because of its subsequent, correct application of law in numerous other decisions. *The action of the Commission which gives rise to this petition for a writ of mandamus is, its arbitrary refusal to apply the correct rule of law to the Bartlesville Zinc Company Case and thereby correct its admitted error.* Therefore, mandamus is the only proper and adequate remedy available to the petitioner. This is *argumentum ad verecundiam*.

Although a contemporaneous interpretation is the best and most authoritative in the eye of the law and

later decisions are the stronger, yet reliance need not be placed solely upon the rule of law declared by the United States Supreme Court in the case of *Davis v. Henderson*, *supra*, for the reason that *the question of the inviolability of a published interstate tariff, because of its approximativeness to a Federal statute*, had been affirmatively passed upon and re-affirmed by that tribunal in a long chain of decisions *prior* to the Commission's decision in the *Bartlesville Zinc Company Case*. (See *Brief of Authorities*, pp. 35-37.) The Commission had, theretofore, not only consistently cited those Supreme Court decisions in their various application, but had itself ascribed those qualities and legal status to a published interstate tariff, whether it involved a rate, charge, rule, regulation, burden or privilege.

So that, it may not be said that the Commission was ignorant of the correct rule of law at the time of its rendition of the *original* decision in the case at bar, (74 I. C. C. Rep. 26 *et. seq*).

*A fortiori*, the Commission's *final* decision in the premises, as contained in its supplemental report of December 5, 1927, (136 I. C. C. Rep. 57, *et seq*), is either a willful disregard of the supreme law of the land or it is *argumentum ad hominem*.

As a final proposition it is contended that, under authority of Section 9 of the Act to Regulate Commerce, any person claiming to be damaged by any common carrier subject to the provisions of such Act for a violation thereof, may elect to either make complaint to the Interstate Commerce Commission or bring suit in his own behalf for the recovery of such damages in a



United States District Court of competent jurisdiction. (*State courts have jurisdiction over overcharges by virtue of the saving clause under Section 22 of the Act*). If he pursues his remedy before the Commission and that tribunal, after full hearing and investigation, *makes a finding of ultimate facts which supports his claim to damages* and yet denies him relief, either through failure or refusal to make an award of reparation, *the only proper, expedient and adequate remedy available to him to enforce his right to damages is by way of a peremptory writ of mandamus*. This is necessarily true for two reasons, viz: (1) *there is no statutory provision for a judicial review by appeal, writ of error or otherwise*; and, (2) *having elected to proceed before the Commission he is bound to pursue his remedy to a conclusion before that tribunal and it is the duty of the Commission to dispose of his entire case according to law*.

## BRIEF OF AUTHORITIES

If by reason of a mistaken view of the law or otherwise there has been in fact no actual and bona fide exercise of judgment and discretion, mandamus will lie.

*38 Corpus Juris, page 599, section 74, note 79.*

So where the discretion is as to the existence of the facts entitling the relator to the thing demanded, if the facts are admitted or clearly proved, mandamus will issue to compel action according to law.

*38 Corpus Juris, page 600, section 74, note 82.*

The duties which will be enforced by mandamus must be such as are clearly and peremptorily enjoined by law.

*38 Corpus Juris, page 600, section 75, note 84.*

Where any tribunal in which discretionary power is lodged has exercised its discretion so far as the exercise is necessary in a particular case, and has given its conclusions upon the facts before it, what remains to be done to make its conclusions effective is purely ministerial, and mandamus will lie to compel its performance.

*38 Corpus Juris, page 609, section 87, note 78.*

Where the making of an order is not judicial but purely ministerial, mandamus will lie to set it aside if erroneous.

*38 Corpus Juris, page 837, section 142, note 91.*

The question of jurisdiction in a particular case, where the facts are admitted or found, is a pure ques-



tion of law; and although the deciding body may have exercised a discretion, if there has been an abuse thereof, mandamus will lie to correct the error.

*Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667; *Virginia v. Paul*, 148 U. S. 107, 37 L. Ed. 386, 13 Sup. Ct. Rep. 536; *Re Christensen Engineering Company*, 194 U. S. 458, 48 L. Ed. 1072, 24 Sup. Ct. Rep. 729; *Ex Parte Harding*, 219 U. S. 363, 55 L. Ed. 252, 31 Sup. Ct. Rep. 324; *Ex parte Brown*, 116 U. S. 401, 29 L. Ed. 676, 6 Sup. Ct. Rep. 587; *United States v. Fossatt*, 21 How. 445, 16 L. Ed. 186 *Ex parte Russell*, 13 Wall. 664, 20 L. Ed. 632; *Re Parker*, 131 U. S. 221, 33 L. Ed. 123, 9 Sup. Ct. Rep. 708; *Re Hohorst*, 150 U. S. 653, 37 L. Ed. 1211, 14 Sup. Ct. Rep. 221; *Ex parte Newman*, 14 Wall. 152, 20 L. Ed. 877; *Roberts v. United States*, 176 U. S. 221, 231, 44 L. Ed. 443, 447, 20 Sup. Ct. Rep. 376; *United States, ex rel. Boynton v. Blaine*, 139 U. S. 306, 35 L. Ed. 183, 11 Sup. Ct. Rep. 607.

Any act in connection with a judicial or quasi-judicial proceeding for which there is no legal excuse is subject to the control of the courts by mandamus.

*United States, ex. rel. West v. Hitchcock*, 19 App. D. C. 333.

“The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity, to require it or him to proceed, the manner of doing so being left to his or its discretion. \* \* \* The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi-judicial duties, but its functions are defined, and, in the main, ex-

plicitly directed, by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its nonaction be reviewed?"

*Interstate Commerce Commission v. United States, ex rel. Humboldt Steamship Company*, (1912) 56 L. Ed. 849, 854; 224 U. S. 474; 32 Sup. Ct. Rep. 556.

Where the Commission wrongly refuses to perform a specific, peremptory duty prescribed by Congress mandamus will lie.

*Interstate Commerce Commission v. United States, ex. rel. Waste Merchants Association of New York*, (1922) 67 L. Ed. 112, 114; 260 U. S. 32; 43 Sup. Ct. Rep. 6.

Mandamus will lie if there is no other specific legal remedy.

*Marbury v. Madison*, 1 Cranch, 163, 2 L. Ed. 69; *Knox County v. Aspinwall*, 24 How. 376, 16 L. Ed. 735; *United States v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721; *Taxing District v. Loague*, 129 U. S. 493, 32 L. Ed. 780; 9 Sup. Ct. Rep. 327; *Re Pennsylvania Company*, 137 U. S. 451, 34 L. Ed. 738, 11 Sup. Ct. Rep. 141; *Seymour v. United States*, 10 App. D. C. 567.

The fact that there is no other remedy available to the plaintiff justifies its right to seek relief by mandamus.

*Ex parte Harding*, 219 U. S. 363, 55 L. Ed. 252, 31 Sup. Ct. Rep. 324; *Ex parte Park Square Automobile*



*Station*, 244 U. S. 412, 61 L. Ed. 1231, 37 Sup. Ct. Rep. 732; *Ex parte Roe*, 234 U. S. 70, 58 L. Ed. 1217, 34 Sup. Ct. Rep. 722; *Ex parte Slater*, 246 U. S. 128, 62 L. Ed. 621, 38 Sup. Ct. Rep. 265; *Ex parte Hoad*, 105 U. S. 578, 26 L. Ed. 1176.

Where, as in this case, a plain duty is imposed upon the Interstate Commerce Commission, and it declines to proceed with its performance, mandamus lies to require it to act.

*Interstate Commerce Commission v. United States, ex. rel. Humboldt S. S. Co.* 224 U. S. 474, 56 L. Ed. 849, 32 Sup. Ct. Rep. 556; *Lane v. Hoglund*, 244 U. S. 174, 61 L. Ed. 1066, 37 Sup. Ct. Rep. 558; *Re Simons*, 247 U. S. 231, 62 L. Ed. 1094, 38 Sup. Ct. Rep. 497; *United States, ex. rel. Louisville Cement Company, v. Interstate Commerce Commission*, 246 U. S. 638, 62 L. Ed. 914, 38 Sup. Ct. Rep. 408; *Ex parte Metropolitan Water Company*, 220 U. S. 539, 55 L. Ed. 575, 31 Sup. Ct. Rep. 600; *Ex parte United States*, 242 U. S. 27, 61 L. Ed. 129, 37 Sup. Ct. Rep. 72; *Ex parte Connaway*, 178 U. S. 421, 44 L. Ed. 1134, 20 Sup. Ct. Rep. 951; *Ketchum Coal Company v. District Ct. 48 Utah* 342, 4 A. L. R. 619, 159 Pac. 737, 26 Cyc. 190.

The courts may correct an error of the Commission on a petition for mandamus, where, as in this case, the erroneous decision cannot be reviewed on appeal or writ of error. *Lex semper dabit remedium.*

*United States, ex. rel. Louisville Cement Company v. Interstate Commerce Commission*, (1918) 62 L. Ed. 914, 917; 246 U. S. 638; Sup. Ct. Rep. 408; cited in *Interstate Commerce Commission v. United States, ex. rel. Waste Merchants Association of New York* (1922) 67 L. Ed. 112, 114; 260 U. S. 32; 43 Sup. Ct. Rep. 6.

*Section 2 of the Interstate Commerce Act*, defining and prohibiting unjust discrimination, provides as follows:

“That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be guilty of unjust discrimination, which it is hereby prohibited and declared to be unlawful.” (24 Stat. L. 379. In effect during the year 1918.)

*Section 3 of the Interstate Commerce Act*, prohibiting undue preference or prejudice, provides as follows:

“That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.” (24 Stat. L. 379. In effect during the year 1918.)

*Section 6 of the Interstate Commerce Act*, requiring that published rates be strictly observed, provides as follows:



“\* \* \*; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of \* \* \* property, or for any service in connection therewith, between the points named in such tariffs than the rates \* \* \* and charges which are specified in the tariff filed and in effect at the time; \* \* \* (24 Stat. 1. 379. 34 Sta. 1. 584. In effect during the year 1918.)

*Section 1 of the Elkins Act*, making the willful failure to strictly observe published tariffs a misdemeanor, provides as follows:

“\* \* \* The wilful failure upon the part of any carrier subject to said Acts to file and publish the tariffs of rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, \* \* \*”. (32 Stat. 1. 847; 34 Stat. 1. 584.)

*Section 8 of the Interstate Commerce Act*, establishing civil liability against common carriers for damages caused by violations of the Act, provides as follows:

“That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney’s fee, to be fixed by the court in every case of recovery, which attorney’s fee shall be taxed and collected as part of the costs in the case.” (24 Stat. L. 379.)

*Section 9 of the Interstate Commerce Act*, establishing the right to complain to the Commission, and requiring an election of remedies, provides as follows:

“That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.” (24 Stat. L. 379.)

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; and, to prevent undue or unreasonable prejudice or disadvantage as to persons, corporations, or localities.

*Interstate Commerce Commission v. The Baltimore & Ohio Railroad Company*, (1892) 36 L. Ed. 699, 705; 145 U. S. 263; 12 Sup. Ct. Rep. 844.

“It cannot be challenged that the great purpose of the Act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for



these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

*New York, New Haven & Hartford Railroad Company v. Interstate Commerce Commission*, (1906), 200 U. S. 361, 391; 50 L. Ed. 515, 521; 26 Sup. Ct. Rep. 272, 277; Cited in *Armour Packing Company v. United States* (1908) 209 U. S. 56; 28 Sup. Ct. Rep. 428; 52 L. Ed. 681.

The interstate Commerce Act prescribes the published-tariff rate as the rule of compensation on interstate shipments and makes the same binding upon the carrier.

*Gulf, Colorado & Santa Fe Ry. Co. v. Hefley*, (1895) 39 L. Ed. 910, 912; 158 U. S. 98; 15 Sup. Ct. Rep. 802; cited in *Texas & Pacific Ry. Co. v. Mugg*, (1906) 202 U. S. 242; 26 Sup. Ct. Rep. 628; 50 L. Ed. 1011.

The law has provided for the establishment of one rate, to be filed as provided, subject to change as provided, and that rate to be, while in force, the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to punish.

*Armour Packing Company v. United States*, (1908) 209 U. S. 56, 81; 28 Sup. Ct. Rep. 428; 52 L. Ed. 681, 694.

The statute makes the rate as published or filed conclusive on the carrier. The carrier files and publishes the rate. It may well be concluded by its own action. But neither shipper nor carrier may vary from the duly

filed and published rate without incurring the penalty of the law.

*Armour Packing Company v. United States supra.*

The statute is read into the contract of transportation and becomes a part of it. Likewise, the published tariff applicable at the time the shipment moves is read into the shipping contract.

*Armour Packing Company v. United States supra.*

It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute.

*Louisville & Nashville Railroad Company v. Mottley* (1911) 219 U. S. 467; 31 Sup. Ct. Rep. 265; 55 L. Ed. 297, 301; cited in *Chicago, I. & L. Ry. Co. v. United States* (1911) 219 U. S. 486; 31 Sup. Ct. Rep. 372; 55 L. Ed. 303, 309. *Louisville & Nashville Rd. Co. v. Maxwell* (1915) 59 L. Ed. 853, 855; 227 U. S. 94; 35 Sup. Ct. Rep. 494.

The published tariff governing interstate transportation between two given points, so long as it remains uncanceled, is as fixed and unalterable, either by the shipper or by the carrier, as if that particular rate had been established by a special act of Congress. When regularly published, it is no longer the rate imposed by the carrier, but the rate imposed by the law. The published rate has taken on a fixed and rigid character that does not permit it to yield either to importunity or mistake. The law governing transportation between two points for which that rate was established requires



that rate to be paid by the shipper and collected by the carrier, and any departure from it, either by the carrier or the shipper, is as much a crime as it would be if the rate had been fixed by special enactment. Not even a court may interfere with a published rate or authorize a departure from it when it has been established voluntarily by the carrier.

*Poor Grain Company v. Chicago, Burlington & Quincy Railroad Company* (1907) 12 I. C. C. Rep. 418.

A duly published tariff in many respects approximates a statute. Parties have no power to vary it by their express contract, much less merely by those implications arising from their conduct.

*Lakewood Engineering Company v. New York Central Rd. Co.* (1919) 259 Fed. Rep. 61, 64; *Pennsylvania R. Co. v. International Coal Mining Co.* (1913) 230 U. S. 184, 57 L. Ed. 1446, 1451, 33 Sup. Ct. Rep. 893.

The law compels carriers to publish and post their schedules of charges upon the theory that they will be informative; they are supposed to be expressed in plain terms, and a shipper who consults them has a right to rely upon their obvious meaning.

*Swift & Company v. United States* (1918) 255 Fed. Rep. 291, 293; citing *Newton Gum Company v. Chicago Burlington & Quincy Rd. Co.* (1909) 16 I. C. C. Rep. 341, 346.

Tariffs are to be construed according to their language, and the intention of the person who framed the tariff, or the arbitrary practice of the carrier thereunder may not be looked to as authoritative construction thereof.

*Hurlburt v. Lake Shore & Michigan Southern Ry. Co.* (1888), 2 I. C. C. Rep. 122, 2 I. C. Rep. 81; *Newton Gum Company v. Chicago, Burlington & Quincy*

*Rd. Co., supra; Pacific Coast Biscuit Company v. Spokane, P. & S. Ry. Co., (1911) 20 I. C. C. Rep. 546, 549; Prairie Oil & Gas Company v. Wabash Railway Company, (1917), 45 I. C. C. Rep. 1, 2.*

The broad purpose of the commerce act to compel the establishment of reasonable rates and their uniform application would be defeated if sanction be given to any special contract, or arrangement.

*Chicago & Alton Railroad Company v. Kirby (1912) 225 U. S. 155; 56 L. Ed. 1033; 32 Sup. Ct. Rep. 648.*

The purpose of the requirement that tariff provisions be strictly adhered to is so that all shippers may receive equal treatment.

*Davis v. Cornwell (1924) 264 U. S. 560; 44 Sup. Ct. Rep. 410; 68 L. Ed. 848, 850; citing Chicago & Alton Railroad Company v. Kirby, supra.*

An interstate carrier cannot waive a rule which is part of its published tariff, to the effect that orders for cars for use of shippers must be in writing. The Court said:

“There is no claim that the rule requiring written notice is void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of a common carrier under published tariffs. The rule was a part of the tariff.”

*Davis v. Henderson, (1924) 69 L. Ed. 182; 266 U. S. 92; 45 Sup. Ct. Rep. 24; citing Davis v. Cornwell, supra.*

Demurrage charges must be expressly authorized by the carrier's tariffs.

*Munroe & Sons v. Michigan Central Rd. Co. (1909), 17 I. C. C. Rep. 27, 29; Schaefer & Sons v. Chicago*



*Rock Island & Pacific Ry. Co. (1910), 18 I. C. C. Rep. 414; Northport Smelting & Refining Company v. Great Northern Ry. Co. (1919), 53 I. C. C. Rep. 641.*

Demurrage charged for the detention of cars in loading or unloading is a terminal charge, required to be shown by the schedules of rates filed and published by an interstate railroad company by the terms of Section 1 of the Interstate Commerce Act which defines "transportation" as including all the instrumentalities and facilities of shipment and all services in connection with the receipt, delivery, and handling of property transported, and by Section 6 of the Act, requiring the filing and publishing of schedules showing all the rates and charges for transportation, stating separately all terminal charges.

*Lehigh Valley Rd. Co. v. United States (1911), 188 Fed. Rep. 879; 110 C. C. A. 513.*

Any departure by an interstate railroad company from the demurrage charges fixed by its filed and published schedules constitutes a misdemeanor under the Elkins Act.

*Lehigh Valley Rd. Co. v. United States, supra.*

Demurrage cannot be assessed unless specifically provided for in the carrier's tariffs.

*Wood v. New York, Philadelphia & Norfolk Rd. Co. (1919), 53 I. C. C. Rep. 183; Sinclair Refining Company v. Schaff (1921), 275 Fed. Rep. 769; Schuhle's Pure Grape Juice Company v. Director General, As Agent (1921), 63 I. C. C. Rep. 129, 132; General Equipment Company v. Atlantic Coast Line Rd. Co. (1916), 37 I. C. C. Rep. 620; Higgins Lumber & Export Com-*

*pany v. New Orleans Great Northern Rd. Co. (1918), 51 I. C. C. Rep. 214; Germain Company v. New Orleans & Northeastern Rd. Co. (1909), 17 I. C. C. Rep. 22; United States v. Denver & Rio Grande Rd. Co. (1910), 18 I. C. C. Rep. 7, 9; Crescent Coal & Mining Company v. Baltimore & Ohio Rd. Co. (1911), 20 I. C. C. Rep. 559, 569; Great Northern Refining Company v. Illinois Central Rd. Co. (1919), 53 I. C. C. Rep. 481; Tioga Coal Co. v. Chicago, Rock Island & Pacific Ry. Co. (1910), 18 I. C. C. Rep. 414; Beekman Lumber Company v. Louisiana Railway & Navigation Company (1910), 19 I. C. C. 343, 347; Crutchfield & Woolfolk v. Southern Pacific Company (1911), 24 I. C. C. Rep. 651; Middle West Coal Co. v. Chesapeake & Ohio Ry. Co. (1916), 41 I. C. C. Rep. 723; Herb Bros. & Martin v. Pittsburgh C. C. & St. L. Ry. Co. (1916), 42 I. C. C. Rep. 583, 584; Holland Aniline Co v. Pere Marquette Ry. Co. (1919), 55 I. C. C. Rep. 617; Roessler & Hasslacher Chemical Co. v. Director General (1920), 56 I. C. C. Rep. 441; Delp Grain Co v. Director General, As Agent (1920), 59 I. C. C. Rep. 755.*

The Commission is duty bound to give full effect to every applicable tariff provision in determining whether the demurrage charges in question accrued.

*United States v. Denver & Rio Grande Rd. Co. (1916), 41 I. C. C. Rep. 712.*

A carrier who fails in its duty to furnish notice as provided by the published tariff may not lawfully demand demurrage charges for detention thereafter.

*Republic Coal Company v. Chicago, St. P. M. & O. Ry. Co. (1923), 85 I. C. C. Rep. 331, 333. Affirmed in National Fire Proofing Company v. Bellefonte Central Railroad Company (1925), 102 I. C. C. Rep. 345, 346,*



which was predicated on *Davis v. Henderson*, 266 U. S. 92.

It has been held, and it is simple and obvious equity, that demurrage may not be assessed except for or because of failure on part of the shipper or consignee to comply with his obligations.

*Crescent Coal & Mining Co. v. Baltimore & Ohio Rd. Co.* (1911), 20 I. C. C. Rep. 559, 569; citing *Coomes & McGraw v. Chicago, M. & St. P. Ry. Co.* (1908), 13 I. C. C. Rep. 192; *New York Hay Exchange Association v. Pennsylvania Rd. Co.* (1908), 14 I. C. C. Rep. 178; *Porter v. St. Louis & S. F. Rd. Co.* (1909), 15 I. C. C. Rep. 1; *American Creosoting Works, Ltd., v. Illinois Central Rd. Co.* (1909), 15 I. C. C. Rep. 160; *Rossie Iron Ore Co. v. New York C. & H. R. Rd. Co.* (1910), 17 I. C. C. Rep. 392.

It is the duty of carriers to make delivery to consignee at the flat line-haul rate stated in the tariffs.

*Associated Jobbers of Los Angeles v. Atchison, T. & S. F. Ry. Co.* (1910), 18 I. C. C. Rep. 310, 316.

The delivery of a car upon an industry track is a substitute for delivery upon public team tracks, and, no additional service being involved, can not be made the basis for an additional charge.

*Associated Jobbers of Los Angeles v. Atchison, T. & S. F. Ry. Co.*, *supra*.

The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars. *Pennsylvania Rd. Co. v. Kittaning Iron & Steel Mfg. Co.* (1920) 253 U. S. 319, 64 L. Ed. 928, 930, 40 Sup. Ct. Rep. 532.

Demurrage can accrue only after delivery of cars upon the tracks where the cars are to be unloaded, or

by showing the existence of some condition provided for by the tariff under which the consignee or consignor is responsible for the failure of the carrier to effect such delivery.

*Associated Jobbers of Los Angeles v. Atchison, T. & S. F. Ry. Co.*, *supra*; *Bennisch v. Long Island Railroad Company* (1912), 25 I. C. C. Rep. 439; *New York, N. H. & H. Rd. Co. v. Porter*, 108 Mass. 499; *Arkansas Midland Rd. Co. v. Premier Cotton Mills*, 153 S. W. (Ark.) 148; *Banner Grain Co. v. Great Northern Ry. Co.*, 119 Minn. 71.

Where the placement of a car upon a private track is later than the date of the arrival notice, the free time for purposes of the accrual of demurrage begins to run from the time of placement upon such private track.

*Alan Wood Iron & Steel Co. v. Pennsylvania Railroad Co.* (1912), 24 I. C. C. Rep. 27; *Central Railroad Co. of New Jersey v. Hite* (1909), 166 Fed. Rep. 976, 979.

Delivery is not made until the car is placed by the carrier at the place where it is to be received by the consignee.

*Pittsburgh, C. C. & St. L. Ry. Co. v. Nash*, 43 Indiana 423.

The placing of a car by a railroad company on one of its switch tracks will not take the place of placement provided for in the tariff, although such switch track is used exclusively for the purposes of the consignee's traffic.

*National Refining Company v. St. Louis I. M. & S. Ry. Co.* (1916), 237 Fed. Rep. 347; *Swift & Company v. Hocking Valley Rd. Co.* (1917), 243 U. S. 281; 37 Sup. Ct. Rep. 287; 61 L. Ed. 722; *Norfolk & Western Rd. Co. v. Swift & Company*, 69 Pa. Sup. Ct. Rep. 132.



Where a switching service is yet to be performed, delivery has not been effected.

*McNeill v. Southern Railway Co. (1906)*, 202 U. S. 543; 50 L. Ed. 1142; 26 Sp. Ct. Rep. 722; *Louisville & Nashville Rd. Co. v. Central Stock Yards Co. (1909)*, 212 U. S. 132; 53 L. Ed. 441; 29 Sp. Ct. Rep. 246.

Where, as in this case, the tariff provides for a written notice of constructive placement, compliance with such notification requirement of the tariff is absolutely essential to the accrual of demurrage.

*American Radiator Company v. Lehigh Valley Railroad Company (1917)*, 44 I. C. C. Rep. 361. (Decided by the Commission prior to the case at bar.)

“Transportation includes delivery and is not complete without it. A carload shipment is not actually delivered unless the car is placed where it can be unloaded or on tracks from which the consignee customarily takes cars with its own power to points of unloading. Actual delivery is a prerequisite to the accrual of demurrage, unless, for a lawful reason named in the delivering carrier’s tariff, actual delivery can not be made. Constructive delivery or placement may then take its place, but not unless all the acts specified in the tariff as the elements of constructive placement have been performed. The burden is upon the carrier to affirmatively show that these acts have been performed. Where notice *in writing* to the consignee is one of the acts specified and, as here, no alternative is provided, notice *in writing* must be given or the free time does not begin to run. For one thing, it is not readily susceptible of proof. Any doctrine of equivalence tends to laxity of practice with all its train of opportunities for preferential treatment. The carriers made their tariff rules with respect to constructive placement for their

own benefit and convenience, and should be held to strict compliance as a prerequisite to collecting demurrage on cars not in fact delivered. Written notices of constructive placement of these cars were not sent or given complainants, as required by the applicable tariff. Accordingly, the demurrage charges were illegally assessed and complainants are entitled to reparation."

*Baltimore Trust Company, etc. v. Director General, As Agent* (1922), 74 I. C. C. Rep. 22, 24, concurring opinion of Mr. Commissioner Hall. See also dissenting opinion of Mr. Commissioner Hall in the case at bar, *Bartlesville Zinc Company v. Director General, As Agent* (1922), 74 I. C. C. Rep. 26.

In *Campbell Construction Company v. LaCrosse & Southeastern Railway Company* (1925), 95 I. C. C. Rep. 603, which involved the same tariff provision on constructive placement as in the case at bar, the Commission found demurrage charges to have been inapplicable because of lack of *written* notice as provided by the tariff and awarded reparation. In this case the Commission admitted its erroneous decision of the case at bar in the following language:

"We have heretofore found that demurrage charges assessed under similar circumstances were applicable and not unlawful. *Bartlesville Zinc Co. v. Director General*, 74 I. C. C. 26; *International Paper Co. v. Director General*, 74 I. C. C. 34. But we view the doctrine of *Davis v. Henderson*, 266 U. S. 92, decided October 27, 1924, as controlling. There a shipper of cattle brought an action in a State court for damages against an interstate carrier then under Federal control for failure to furnish a car within a reasonable time after notice.



The defense was that the shipper had not complied with the rule, published in a tariff duly filed with us, which provided that orders for cars must be placed with the local agent in writing. Written notice was not given, but plaintiff was permitted to testify that he had notified the station agent orally, and that the agent had accepted his oral notice. The trial court refused to instruct the jury that the shipper could not recover without proving a notice in writing. Complainant obtained the judgment, and it was affirmed by the highest court in the State. The Supreme Court in reversing the judgment, said: 'There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariff. The rule was a part of the tariff.' "

Written notice to the consignee is required by the demurrage rule covering constructive placement. In the absence of an admission of receipt of written notice proof that such notice was mailed or otherwise served on the consignee must be established by the carrier. Therefore, demurrage charges collected prior to actual placement of such cars on complainant's private tracks were without tariff authority.

*General Motors Corporation v. Director General, As Agent (1925), 100 I. C. C. 341, 344, affirming Campbell Construction Company v. LaCrosse & Southeastern Ry. Co., supra.*

The tariffs laid upon defendants the duty of sending notice by wire either to the consignor or to the agent at point of shipment, failing in which no demurrage accrued after the lapse of five days from the first 7:00 a. m. after the day on which notice of arrival was

sent or given consignee. The tariff provisions as to notice were not complied with.

*Central West Coal & Lumber Company v. Chicago, Burlington & Quincy Rd. Co.* (1925), 104 I. C. C. Rep. 452, 453, citing *Campbell Construction Company v. LaCrosse & Southeastern Ry. Co.*, *supra*. Affirmed in *Louisell Pine & Hardwood Company, Inc. v. Chicago, Rock Island & Pacific Rd. Co.* (1927), 132 I. C. C. 341, 342.

It is immaterial whether complainant received notice otherwise that the shipment was unclaimed, for the tariff requirement that consignor be advised by wire could not be waived, such notice being a prerequisite to the accrual of demurrage after the expiration of the five days' free time mentioned in the tariff.

*Milne Lumber Company v. Michigan Central Rd. Co.* (1926), 118 I. C. C. Rep. 580, 582; citing *Davis v. Henderson*, 226 U. S. 92, *supra*, and *Campbell Construction Company v. LaCrosse & Southeastern Ry. Co.*, 95 I. C. C. Rep. 603, *supra*.

Actual notice is not a "substantial compliance" with a tariff rule requiring written notice.

*Western Bridge & Construction Company v. St. Louis-San Francisco Ry. Co.* (1926), 118 I. C. C. Rep. 607, 609; citing *Davis v. Henderson*, *supra*, and *Campbell Construction Company v. LaCrosse & Southeastern Ry. Co.*, *supra*.

Written notice is a condition precedent to the holding of cars under constructive placement.

*Woodcock Company v. Atlantic Coast Line Rd. Co.* (1927), 136 I. C. C. Rep. 419, 421.



The shipper's cause of action to recover back overcharges accrues on the day that the overcharges were actually paid to the carrier.

*Phillips Company v. Grand Trunk Western Railway Company* (1915), 236 U. S. 662; 35 Sup. Ct. Rep. 418; 59 L. Ed. 774; *United States ex rel. Louisville Cement Company v. Interstate Commerce Commission* (1918), 246 U. S. 638; 38 Sup. Ct. Rep. 408; 62 L. Ed. 914. (This was the law at the time of the accrual of the cause of action in the case at bar.)

Complainant is entitled to recover interest on demurrage improperly collected.

*Munroe & Sons v. Michigan Central Rd. Co.* (1909), 17 I. C. C. Rep. 27.

What construction shall be given a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute. Every question of construction of a tariff is deemed a question of law, and where the question concerns an interstate tariff, it is one of Federal law.

*Great Northern Railway Company v. Merchants Elevator Company* (1922), 259 U. S. 285; 42 Sup. Ct. Rep. 477; 66 L. Ed. 943 and cases cited in judicial note two at p. 948.

Where the question involved is solely one of construction of a tariff, or otherwise a question of law, and not one of administrative discretion, the court has jurisdiction in the first instance without preliminary resort to the Interstate Commerce Commission.

*Louisville & N. R. Co. v. Cook Brewing Company*, (1912), 223 U. S. 70, 84, 56 L. Ed. 355, 359, 32 Sup. Ct.

*Rep.* 189; *Pennsylvania Rd. Co. v. International Coal Mining Company*, (1913) 230 U. S. 184, 196, 57 L. Ed. 1446, 1451, 33 Sup. Ct. Rep. 893; *Pennsylvania Rd. Co. v. Puritan Coal Mining Company*, (1915) 237 U. S. 121, 134, 59 L. Ed. 867, 874, 35 Sup. Ct. Rep. 484; *Eastern R. Co. v. Littlefield*, (1915) 237 U. S. 140, 59 L. Ed. 878, 892, 35 Sup. Ct. Rep. 498; *Illinois C. Rd. Co. v. Mulberry Hill Coal Company* (1915) 238 U. S. 275, 59 L. Ed. 1306, 1310, 35 Sup. Ct. Rep. 760; *Pennsylvania Rd. Co. v. Sonman Shaft Coal Company*, (1916) 242 U. S. 120, 61 L. Ed. 188, 191, 37 Sup. Ct. Rep. 46; *Pennsylvania Rd. Co. v. Kittaning Iron & Steel Mfg. Company* (1920) 253 U. S. 319, 64 L. Ed. 928, 930, 40 Sup. Ct. Rep. 532; *Great Northern Ry. Co. v. Merchants Elevator Company* (1922) 259 U. S. 285, 66 L. Ed. 943, 946, 42 Sup. Ct. Rep. 477; *Swift & Company v. Hocking Valley Rd. Co.* (1917) 243 U. S. 281, 61 L. Ed. 722, 37 Sup. Ct. Rep. 287; *St. Louis I. M. & S. R. Co. v. Hasty & Sons*. (1921) 255 U. S. 252, 256, 65 L. Ed. 614, 616, 41 Sup. Ct. Rep. 269; *Hite v. Central R. of New Jersey*, (1909) 96 C. C. A. 326, 171 Fed. Rep. 372; *Barrett v. Gimbel Bros., Inc.* (1915) 226 Fed. Rep. 623, 141 C. C. A. 379; *National Elevator Company v. Chicago, M. & St. P. Ry. Co.* (1917) 158 C. C. A. 558, 246 Fed. Rep. 588; *Francesconi & Company v. Baltimore & O. R. Co.* (1921) 274 Fed. Rep. 687, 691.



## ARGUMENT

The defendant, Interstate Commerce Commission, is an administrative tribunal, created by acts of Congress, authorized and empowered to administer the Interstate Commerce Act and Section 10 of Federal Control Act and charged with the duty of executing and enforcing the provisions of those statutes.

The Commission's findings of ultimate facts, as set forth in its report in 74 *I. C. C. Rep.* 26, *et seq.*, are taken by the petitioner as true and are *res adjudicata* and as such are binding upon the petitioner and the defendant, the same as in every other appellate proceeding at law. This is necessarily so in an action for a writ of mandamus where the facts must be relied upon for the purpose of the determination of the suit.\* In

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\*The petitioner seeks permission to amend its Reply filed herein by eliminating the issues of fact tendered in paragraphs 6 and 7 thereof, which allege as follows: "Petitioner avers that in its Supplemental Report and Decision of December 5, 1927, said defendant made certain findings of fact, etc., \* \* \*"; "Whereas, in fact, the evidence and the record as made shows that \* \* \* its general auditor thereafter told him such written notices were not necessary (Defendant's Witness Walcher, Rec. 119)" (Transcript of Record, pp. 33, 34).

The only question involved in this case presents an issue of law and that is, whether or not written constructive placement notices were given by the carrier to the consignee as required by the published tariff.

The Court should, therefore, ignore these issues of fact, raised in the reply, because it is clear that they were pleaded by misapprehension, not only from the petitioner's repeated admissions of the truth of the Commission's findings of ultimate facts, but from the allegations of paragraph 5 of its reply wherein it attacks the Supplemental Report of the Commission as being immaterial and irrelevant to the issues of law involved in this case.

The Court may take judicial notice of what are the true facts and real issues presented by the record in this case without regard to the pleadings (*Swift & Company v. Hocking Valley Rd. Co.*, (1917) 243 U. S. 281, 37 Sup. Ct. Rep. 287, 61, L. Ed. 722).

See Judicial Code, Section 269 on harmless error (U. S. Code, p. 910, Title 28; R. S. §726; Mar. 3, 1911, c. 231, §269, 36 Stat. 1163; Feb. 26, 1919, c. 48, 40 Stat. 1181), also Stephen's Common-Law Pleading.

Therefore, the petitioner's case should not be prejudiced by the missapprehensive pleading of these issues of fact, inasmuch as it is apparent that no issue of fact may be raised in a mandamus proceeding and that all parties are bound by the ultimate findings of fact of the Commission, and that they are *res adjudicata*.

this connection it is claimed that nothing contained in the Commission's supplemental report and decision of December 5, 1927, modified the issue of law presented by the original report and decision. In its original decision it held that the demurrage charges were assessed in *substantial* compliance with the provisions of the applicable tariff, although Rule 5, Section A of the tariff clearly requires *written notice* of constructive placement of all cars which it has been unable to deliver on the consignee's private tracks because of conditions attributable to the consignee, before demurrage charges may lawfully accrue, and in its supplemental decision it affirms this conclusion that the demurrage charges in issue were assessed in accordance with tariff authority and were not unlawful. The Commission's insistence in its supplemental report that there was a joint check of the carrier's tracks 1 and 2 does not differ from its finding in its original report. And in passing, it should be noted that there was no tariff authority for an employee of the petitioner (consignee) to enter upon the carrier's right of way in order to ascertain what cars belonging to his employer were being held by the carrier in its possession; and in doing so he was a trespasser upon the carrier's right of way and could have been ejected as such. The following statements contained in the Commission's supplemental report are *conclusions of law*:

“In thus making the check the two clerks acted jointly for both parties, and complainant thereby obtained written notice from defendant of cars which could not be delivered because of congestion in complainant's yard. \* \* \*. The notice given complainant through the yard check was in substantial compliance with tariff rules, and as the sufficiency of such notice was not called in question



within the time limited, it must be held to have been in accordance with tariff requirements."

These statements should be ignored. It is for the Court to say whether or not the conduct of the parties, as set forth in the Commission's report, constitutes the written notice from the carrier's agent to the consignee required by the tariff.

It is claimed that the only defense that may be legally asserted by a carrier for the imposition of such demurrage charges is proof that it gave the consignee *written notice* of the constructive placement of such cars because of its inability to effect delivery due to conditions attributable to the consignee. There is no contention on the part of the carrier that written notices were sent or given as is required by the published tariff and there is no finding to that effect. On the contrary, the Commission specifically found that no written notices were sent or given the consignee other than the *arrival* notices. This is admitted by the defendants on the pleadings. It also specifically found that the detention of the cars on tracks 1 and 2 was attributable to the complainant. This latter finding places the case under Rule 5, Section A of the carrier's tariff requiring written notice of constructive placement before demurrage charges may be assessed.

It should be noted that the demurrage tariff provides for two classes of notices from the carrier to the consignee, viz. (1) the notification of arrival at destination, under Rule 4, such notice to contain point of origin, car initials and numbers, the contents of cars, etc.; and (2) the written notice, under Rule 5, Section A, from the carrier's agent to the consignee that he has been unable to deliver because of the condition of the

private tracks or because of other conditions attributable to the consignee. This then will be considered a constructive placement for the purpose of the accrual of demurrage charges, otherwise not. These two notices are separate and distinct and perform different offices. The arrival notice should not be considered in this case as only the constructive placement notice required by Rule 5, Section A is involved.

The checks of tracks 1 and 2 by the consignee's employee could not possibly inform the consignee of the particular cars that were being held in the carrier's possession on its right of way due to its inability to effect delivery because of the congestion of the consignee's private tracks or other conditions attributable to the consignee, and upon what cars demurrage was accruing.

The purpose of the requirement of Rule 5 Section A as to written notice of constructive placement is apparent. Demurrage is a penalty assessed by the carrier against the shipper or consignee for its own benefit to expedite the release of its equipment. Demurrage charges must be expressly authorized by the carrier's tariff and a carrier who fails in its duty to furnish notice as provided by the published tariff may not lawfully demand demurrage charges for detention thereafter. Demurrage charges can accrue only after delivery of cars upon the tracks where the cars are to be unloaded, or by the carrier showing the existence of some condition provided for by the tariff under which the consignee is responsible for the failure of the carrier to effect such delivery. The placing of a car by a railroad company on one of its switch tracks will not take the place of placement provided for in



the tariff, although such switch is used exclusively for the purpose of the consignee's traffic. Such is the status of tracks 1 and 2; they are switch tracks of the carrier, owned by the carrier and constructed on its right of way to afford additional storage space for loaded and empty cars and to facilitate their handling to and from the consignee's plant. The Commission made a clear finding in this regard and there can be no question of the legal status of these tracks 1 and 2. Cars were at no time unloaded while upon these tracks and they were never intended to be used for that purpose. Furthermore, there is no evidence or finding of fact that these tracks could be used by the consignee for loading and unloading purposes; certainly they could not be used as a matter of law without tariff authorization.

So far, the matter of written notice has been considered negatively—from the standpoint of the failure of the carrier to furnish such notice as required by the tariff. Consider the matter from an affirmative viewpoint and the conclusion of the Commission that there may be a substantial compliance with the tariff by the conduct or agreement of the parties or by an arrangement mutually recognized becomes a self-proving error of law. To state the proposition is to negative it. No condition surrounding demurrage charges, or any other transportation charges, may be imposed by the carrier without tariff authority. There is certainly no finding of fact in this case that the carrier's tariff authorized any circumstance or condition in lieu of the written notice specifically provided for. The decision of the Commission in dismissing the petitioner's complaint was based upon an interpretation of law by the Commission which was contrary to a later

construction of the same proposition of law by the United States Supreme Court in the case of *Davis v. Henderson*, 266 U. S. 92 and subsequently so recognized and applied by the Commission, not only in the case of *Campbell Construction Company v. La Crosse & Southeastern Ry Co.*, 95 I. C. C. Rep. 603, 605, but in numerous other cases both prior and subsequent to the decision of the case at bar.

This proposition of law was decided affirmatively by the Commission in the following named cases:

*American Radiator Company v. Lehigh V. Rd. Co.* (1917) 44 I. C. C. Rep. 361.

*Republic Coal Company v. Chicago, St. P. M. & O. Rd. Co.*, (1923) 85 I. C. C. Rep. 331.

*Campbell Construction Co. v. V. La Crosse & S. E. Ry Co.*, (1925) 95 I. C. C. Rep. 603, 605.

*General Motors Corporation v. Director General*, (1925) 100 I. C. C. Rep. 341.

*National Fireproofing Co. v. Bellefonte C. Rd. Co.*, (1925) 102 I. C. C. Rep. 345.

*Central West Coal & Lumber Co. v. Chicago, B. & Q. Rd. Co.*, (1925) 104 I. C. C. Rep. 452.

*Milne Lumber Co. v. Michigan C. Rd. Co.*, (1926) 118 I. C. C. Rep. 580.

*Western Bridge & Construction Co. v. St. Louis-S. F. Ry. Co.*, (1926) 118 I. C. C. Rep. 607, 609.

*Louisell Pine & Hardwood Co. Inc. v. Chicago, R. I. & P. Ry. Co.*, (1927) 132 I. C. C. Rep. 341.

*Woodcock Company v. Atlantic C. L. Rd. Co.*, (1927) 136 I. C. C. Rep. 419.



In all the above-named cases the Commission adhered strictly to the provisions and requirements of the published tariff. There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariff. The rule was a part of the tariff.

In the case at bar the Commission accepted the conduct of the parties and a so-called mutual arrangement as constituting a *substantial* compliance with the published tariff in lieu of the written notice specifically required from the carrier by such tariff. (This allegation of paragraph 6 of the petition is admitted by paragraph 6 of the defendant's answer.)

It is interesting to note that on October 23, 1922, Division Three of the Commission, composed of Commissioners Hall, Eastman and Campbell, filed its reports and rendered its decisions in the case at bar and also in the case of *Baltimore Trust Company v. Direct General, as Agent*, 74 I. C. C. Rep. 22, et. seq. The facts and issues involved in both cases were identical and involved the construction of the same tariff provisions, viz., Rule 5 Section A of the carrier's demurrage tariff hereinbefore set forth. In the case at bar recovery of the demurrage overcharge was denied. In the *Baltimore Trust Company* case recovery of such demurrage overcharge was allowed. From the inconsistency in the Commission's decisions it is evident that it is mistakenly endeavoring to exercise equitable powers, while the construction and interpretation of an interstate freight tariff present a question of law, and that a Federal question. The rule of law governing

these cases, as subsequently enunciated by the United States Supreme Court and later applied by the entire Commission, was stated by Mr. Commissioner Hall in the case at bar in his dissenting opinion therein and in his qualified concurrence in the *Baltimore Trust Company case, supra*. In the case at bar, Mr. Commissioner Hall dissenting, stated as follows:

“Written notices of inability to deliver because of conditions attributable to the consignee were not sent or given to the consignee, as provided by the applicable tariff. It follows that there was no constructive delivery or placement, for the reasons set forth in my concurring expression in *Baltimore Trust Co. v. Director General*, 74 I. C. C. Rep. 22. Demurrage was illegally assessed and reparation should be awarded” (74 I. C. C. Rep. 26, 30).

In the *Baltimore Trust Company Case, supra*, Mr. Commissioner Hall, in his qualified concurrence, stated as follows:

“Transportation includes delivery and is not complete without it. A carload shipment is not actually delivered unless the car is placed where it can be unloaded or on tracks from which the consignee customarily takes cars with its own power to points of unloading. Actual delivery is a prerequisite to the accrual of demurrage unless, for a lawful reason named in the delivery carrier’s tariff, actual delivery cannot be made. Constructive delivery or placement may then take its place, but not unless all the acts specified in the tariff as the elements of constructive placement have been performed. The burden is upon the carrier to affirmatively show that these acts have been performed. Where notice *in writing* to the consignee is one of the acts specified and, as here, no alternative is provided, notice *in writing* must be given



or the free time does not begin to run. Notice given or acquired in some other manner is not sufficient. For one thing, it is not as readily susceptible of proof. Any doctrine of equivalence tends to laxity of practice with all its train of opportunities for preferential treatment. The carriers made their tariff rules with respect to constructive placement for their own benefit and convenience, and should be held to strict compliance as a prerequisite to collecting demurrage on cars not in fact delivered.

“*Written notices* of constructive placement of these cars were not sent or given complainants, as required by the applicable tariff. Accordingly, the demurrage charges were illegally assessed and complainants are entitled to reparation” (74 I. C. C. Rep. 22, 25).

The following statement of facts contained in the dissenting opinion of Mr. Commissioner Hall in the case at bar are significant:

“Dentention time on the cars here considered was computed from the first 7 a. m. after they were placed on tracks 1 and 2. Defendant apparently deemed such placement to be delivery. Cars which could not be placed on these tracks were held in the Blackwell yards and written notices of constructive placement were sent to complainant. But cars so placed were not in fact delivered. They could not be there unloaded and were later moved by defendant without additional charge to unloading points within complainant’s plant. Nor were the cars being held by defendant ‘for orders’. Demurrage was not assessed on that theory” (74 I. C. C. Rep. 26, 30).

Demurrage charges accrue after actual placement on private sidetracks or after constructive placement has been accomplished within the terms of the tariff. But

*written notice* by the carrier is a condition precedent to the constructive placement and the accrual of demurrage charges. *Conditio praecedens adimpleri debet priusquam sequatur effectus.*

Delivery is not made until the car is placed by the carrier at the place where it is to be received by the consignee. The placing of a car by a railroad company on one of its switch tracks will not take the place of placement provided for in the tariff, although such switch is used exclusively for the purpose of the consignee's traffic. Where a switching service is yet to be performed, delivery has not been effected. Where, as in this case, the tariff provides for a written notice of constructive placement, compliance with such notification requirement of the tariff is absolutely essential to the accrual of demurrage charges.

In its supplemental report the Commission stated:

"Furthermore, as pointed out in the original report, complainant occasionally took samples of ore from cars on tracks 1 and 2. Under Rule 4, Section D this removal of part of the contents in such cases was equivalent to notice."

This statement is clearly without merit, if by the words "equivalent to notice" the Commission means constructive-placement notice under Rule 5-A. Rule 4 of the demurrage tariff is confined strictly to the subject of notification of the consignee by the carrier of the *arrival* of the cars at destination *and has nothing to do with the written notice of constructive placement.* Rule 4 on notification provides in Section A thereof that the arrival notice shall be sent or given consignee by the carrier's agent in writing or as otherwise agreed to by carrier and consignee; Section C, provides that de-



livery of cars upon private or industrial interchange tracks, or written notice sent or given to consignee of the carrier's readiness to so deliver, will constitute notification thereof to consignee; Section D to which the Commission refers, provides that in all cases where notice is required the removal of any part of the contents of a car by the consignee shall be considered notice thereof to the consignee. *De minimis non curat lex*. The logic of these rules on notification of arrival is obvious. Although the consignee is entitled to written notice of arrival he may agree with the carrier for notice of arrival in some other form, daily telephonic notice, for example. If the car is actually delivered upon his private sidetrack, why of course, he is apprised of its arrival. Of if the carrier notifies the consignee in writing of its readiness to deliver on the consignee's private sidetrack, that will constitute notice of arrival, for reasons that are apparent. Likewise, if the consignee removes a part of the lading from the car he will be held to have sufficient notice of the arrival of the car.

But under Rule 5, Section A on constructive placement, there is an entirely different subject with a different purpose prevailing and a far more cogent reason for written notice. For one thing, if formal written notice were not required, the carrier could maintain any demurrage charge by simply claiming that it was unable to place the car on the consignee's private track because of congestion or some other reason allegedly attributable to the consignee, regardless of the truth of the statement. It is the carrier's imperative duty under the line-haul rate to effect delivery upon the consignee's private track and if it claims

that it was unable to effect such delivery because of an act of neglect or inability to receive on the part of the consignee, it should place the consignee upon notice of that fact in writing. Thereafter the detention of the car by the carrier in its possession will be considered constructive placement and demurrage charges will lawfully accrue and under such circumstances the consignee will have no defense to the payment of such charges.

In its supplemental report the Commission makes the following statement:

“Assuming that additional notice was required for cars placed on tracks 1 and 2 under Rule 5 Section A, as complainant contends, there is ground for holding that the reference to Rule 4 at the end of that section in the 1916 rules could be construed as authorizing by mutual agreement notice in some form other than writing, as provided in Rule 4, Section A.”

The above statement on the part of the Commission is frivolous and contrary to all canons of construction. It is true that at the end of Rule 5, Section A is the following direction: “See Rule 4 (Notification)”. But what more can it mean than simply to direct the attention of the user of the tariff to the fact that there is a different rule on the subject of notification of arrival and that to be found in Rule 4? There is no repugnancy between Rules 4 and 5, or any other of the demurrage rules. To sustain the Commission’s interpretation would be to hold that Rule 5, Section A on written constructive-placement notice was nullified by Rule 4 on arrival notice. The Commission’s construction would



place Rules 4 and 5 of the demurrage tariff in direct antagonism with each other and cause Rule 4 to nullify Rule 5-A. Such a paradox may not be ascribed to the framers of this demurrage tariff. It is the duty of the Commission to construe these several demurrage rules so as to make each effective within the plain meaning of its language and not endeavor to interject an ambiguity into the tariff which does not exist, simply for the purpose of supporting an illogical conclusion. It would be far easier to retract from its erroneous decision and decide the case in consonance with the decision of the United States Supreme Court in *Davis v. Henderson, supra*. The Commission's conclusion of law is inconsistent with its findings of fact.

Tariffs must be construed according to their language, and if any ambiguity does exist, it must be construed against the carrier, the framer of the tariff. This has been the canon of administrative construction applied by the Commission since its organization down to date. That is, with the exception of the case at bar.

Words ought to be construed so as to give them effect and operation. In a doubtful case, the construction which the words point out is the construction given by the law. Even in doubtful matters, such an interpretation is to be adopted that inconsistency and absurdity may be avoided. But where there is no ambiguity in the words of an instrument, no interpretation must be given to it contrary to the words.

However, it is claimed that there is no ambiguity in the tariff provisions in the case at bar which require

a prior administrative interpretation by the Commission and the Court has full power to place its own construction upon these demurrage rules.

A duly published tariff has the force of a Federal statute. Parties have no power to vary it by their express contract, much less merely by those implications arising from their conduct. *A verbis legis non est recedendum.*

In its supplemental report, the Commission endeavored to differentiate between the facts in the case of *Campbell Construction Company v. LaCrosse & S. E. Ry. Co.*, *supra* and the case at bar. In the *Campbell Construction Co. case*, wherein the Commission admitted its error in the *Bartlesville Zinc Co. case*, the case at bar, the Commission ordered a refund of the demurrage charges assessed because of the absence of written notice of inability of the carrier to effect delivery. There is absolutely no difference between the questions involved in the two cases. It is true that in the *Campbell Construction Company case* the Commission found that there was no arrival notice sent or given, although it was shown that the consignee had knowledge of arrival by oral notice from the carrier's agent; but there were no written constructive placement notices. Eliminate the matter of arrival notice from the Commission's analytical comparison, because immaterial to either case, and the *Campbell Construction Co. case* is on all fours with the case at bar. With due respect to the opinion of the Commission, it is claimed that the case of *Campbell Construction Company*, *supra*, and the case at bar are apposite.



Again, in its supplemental report, the Commission stated as follows:

“Rule 8, Section D of the 1916 rules above quoted expressly authorized substantial compliance with requirements concerning notice, rather than literal compliance, unless the consignee made written objection to the sufficiency of such notice. The notice given complainant through the yard check was in substantial compliance with tariff rules, and as the sufficiency of such notice was not called in question within the time limited, it must be held to have been in accordance with tariff requirements.”

The above is a very strained construction of these tariff rules by the Commission and is not consonant with an unbiased, judicial interpretation. For the Court's convenience Rule 8, Section D, as reported by the Commission in 74 *I. C. C. Rep.* 26, 28, reads as follows:

“Rule 8—Claims.

“Section D. *Delayed or improper notice by carrier.* When notice has been sent or given in substantial compliance with the requirements as specified in these rules, the consignees shall not thereafter have the right to call in question the sufficiency of such notice unless within forty-eight hours from 7 a. m. following the day on which such notice is sent or given he shall serve upon the delivering carrier a full written statement of his objections to the sufficiency of such notice.”

When it is considered that each of these demurrage rules covers a separate and distinct subject-matter, viz: Rule 4 on notification of arrival at destination, Rule 5 on constructive-placement notice, etc., the interpretation given to the foregoing Rule 8, Section D, on delayed or improper notice by carrier is clearly erron-

eous. Not only do these different rules cover different subject-matters, but they have a different mode of operation. How can it be said that a check record of cars on tracks 1 and 2 by a clerk of the carrier and a similar check record by a clerk of the consignee, and by them compared, possibly, was a written notice from the carrier to the consignee even substantially in compliance with the tariff Rule 5-A? If such is the conclusion, it is apparently so strained as to be absurd. On the subject of *constructive placement* because of some act of neglect attributable to the consignee, Rule 5, Section A provides but one form of notice and that is a *written notice*. So that, in order for there to be a *substantial* compliance with such rule in contemplation of Rule 8, Section D, above quoted, there would have to be a written notice informing the consignee with sufficient certainty that a particular car was being held by the carrier under constructive placement with demurrage accruing because the carrier was unable to effect delivery on account of some act of neglect attributable to the consignee. If then, the consignee did not deem such written notice sufficient to apprise him of all the facts covering the particular car referred to, he would be obliged, under the terms of Rule 8, Section D, to serve upon the delivering carrier a full written statement of his objection to the sufficiency of such notice within forty-eight hours from 7 a. m. following the day on which notice is sent or given him by the carrier. Substantial compliance with Rule 5, Section A, on written constructive-placement notice certainly contemplates some form of written notice. The consignee could not object to the sufficiency of a written notice that was not in fact given. The formal notice adopted by the carrier as a written constructive-placement no-



tice under the requirements of Rule 5, Section A, was served upon the consignee by the carrier on those cars that were held in its Blackwell yards, but not on those cars that were held by the carrier on its hold tracks 1 and 2. (*Statement by Mr. Commissioner Hall, 74 I. C. C. Rep. 26, 30.*)

What construction shall be given a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute. Every question of construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of Federal law. Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed here is to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. The Courts have full power to interpret a published tariff in interstate commerce.

To the extent that the purposes of the Interstate Commerce Act were to secure equality of rates, destroy favoritism and all forms of unjust discrimination, the statute is remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve.

The Act prescribes the published-tariff rate as the rule of compensation on interstate shipments and makes the same binding upon all parties. The law has provided for the establishment of one rate, to be filed as provided, subject to change as provided, and that rate

to be, while in force, the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prevent. The statute makes the rate as published and filed conclusive on the carrier. The carrier publishes and files the rate and it may well be concluded by its action. But neither shipper nor carrier may vary from the duly published and filed rate without incurring the penalty of the law. As the statute is read into the contract of transportation and becomes a part of it, so, likewise, the published tariff applicable at the time of the movement of the shipment is read into the shipping contract. The published rate governing interstate transportation between two given points, so long as it remains uncanceled, is as fixed and unalterable, either by shipper or carrier, as if that particular rate had been established by special act of Congress. Not even a Court may interfere with a published rate or authorize a departure from it when it has been established voluntarily by the carrier. A duly published tariff in many respects approximates a statute.

The law compels carriers to publish and post their schedules of charges upon the theory that they will be informative; they are supposed to be expressed in plain terms, and a shipper who consults them has a right to rely upon their obvious meaning. Tariffs must be construed according to their language, and the intention of the person who framed the tariff, or the arbitrary practice of the carrier thereunder may not be looked to as authoritative construction thereof.



It is needless to do more than simply direct the Court's attention to the following statutory provisions governing the case at bar:

Section 2 of Act to Regulate Commerce, defining and prohibiting unjust discrimination.

Section 3 of Act to Regulate Commerce, prohibiting undue preference or prejudice.

Section 6 of Act to Regulate Commerce, requiring that the carrier's published rates be strictly observed.

Section 1 of Elkins Act, making the willful failure to strictly observe published tariffs a misdemeanor.

Section 8 of Act to Regulate Commerce, establishing a civil liability against a common carrier for damages caused by violation of the Act.

Section 9 of Act to Regulate Commerce, requiring an election of remedies.

In view of the character of the question involved in this case, the collection of an overcharge, the petitioner could have proceeded originally in the courts for the recovery of such overcharge without reference to prior administrative action of the Interstate Commerce Commission. This case involves *the construction of an interstate tariff and presents a question of law* over which the courts, both Federal and State, have concurrent jurisdiction with the Commission. However, the petitioner elected to proceed by formal complaint before the Interstate Commerce Commission and has exhausted its remedies before that tribunal, and, of necessity, must pursue its course in that channel to a conclusion *through the intervention of this honorable court*, if relief is to be had. Therefore, the petitioner should

not be prejudiced by the Commission's erroneous construction of this tariff and its arbitrary refusal to correct its admitted error. The very fact that the petitioner elected to proceed before the Commission affords the best ground for invoking the aid of this honorable court by mandamus to compel the Commission to decide the case *according to law* and thereby correct its *admitted error* because, unless such relief is granted, the petitioner is remediless.

Had the petitioner originally instituted suit before a court of competent jurisdiction, instead of filing a complaint before the Commission, for the recovery of these demurrage overcharges, there would have been presented for judicial determination the same character of question as is involved in this case, viz., the question of law involving the construction of Rule 5, Section A of the carrier's published interstate demurrage tariff. Admitting the power of the court to hear the case originally without prior administrative action of the Commission, certainly the court has here the same power on appeal to determine the same question of law upon the same state of facts. *Ubi eadem ratio, ibi eadem lex.*

The Commission's findings of ultimate facts are admitted by petitioner to be *res adjudicata* in this case, the gravamen of this action being the arbitrary refusal of the Commission to correct its admitted error of law and its arbitrary refusal to apply the correct rule of law to the *Bartlesville Zinc Company Case* while so doing in numerous other cases. Therefore, the judicial power in this case should be exercised by way of the peremptory writ of mandamus addressed to the Commission to correct its arbitrary acts of omission



and commission in the application of law. This is in harmony with reason.

When the Commission found facts which were tantamount to the finding of the existence of an overcharge in rates, it should have *ipso facto* ordered a refund of such illegal charges. This involves no administrative or judicial discretion, but the performance of a *ministerial duty enjoined by law*.

Where the making of an order is not judicial but purely ministerial, mandamus will lie to set it aside if erroneous. Where the Commission refuses to perform a specific, peremptory duty prescribed by Congress mandamus will lie. The Courts may correct an error of the Commission on a petition for mandamus, where, as in this case, the erroneous decision can not be reviewed on appeal or writ of error. Mandamus will lie if there is no other specific legal remedy. Where, as in this case, a plain duty is imposed upon the Interstate Commerce Commission, and it declines to proceed with its performance, mandamus lies to require it to act. No appeal or writ of error is provided by statute and unless the Court acts favorably on this petition the petitioner will be remediless and will sustain irreparable injury and pecuniary loss. Therefore, inasmuch as the wrongful action of the Commission in refusing the demand of the petitioner that it be granted the relief to which it is entitled under the law cannot be reviewed by appeal or writ of error proceeding, and inasmuch as there is no other expedient and adequate remedy available to the petitioner in the enforcement of its rights, the petitioner respectfully submits that the writ of mandamus should issue directed to the Com-

mission commanding it to enter in the case at bar an order consistent with the law and the facts in such case; and that it forthwith perform its ministerial duty in accordance with the provisions of the Interstate Commerce Act; and that it enter or cause to be entered in the said cause an order awarding reparation to the petitioner as prayed for in its complaint filed therein; and that it take such action as by law required, in order to ascertain the amount of damages to which the petitioner is entitled by way of reparation for the overcharges illegally assessed against and paid by it; and to make such other or further order or orders in the premises as justice may require. *Ubi jus, ibi remedium.*

Respectfully submitted,

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